United States Court of Appeals

for the Second Circuit



APPELLANT'S REPLY BRIEF

75-7165
75-7166

B
P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA,
Plaintiff-Appellant,

against

UNITED BRANDS COMPANY,
Defendant-Appellee.

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA,
Plaintiff-Appellant,

against

COMPANIA AGRICOLA DE GUATEMALA,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFF-APPELLANT

SIDNEY BENDER
Attorney for Plaintiff-Appellant
405 Lexington Avenue
New York, N.Y. 10017
Tel. 986-4080

UNITED STATES COURT OF APPEALS
FILED
OCT 28 1975
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

3

Table of Contents

Page No.

Point I
THE DEFENDANTS-APPELLEES HAVE NOT REFUTED PLAINTIFF'S POSITION THAT IT WAS ERROR OF LAW FOR THE DISTRICT COURT TO LEGALLY EXCUSE DEFENDANT UNITED'S ANTITRUST VIOLATIONS ON THE GROUND (ARGUENDO) OF A LEGITIMATE BUSINESS REASON (PMB 114,116-117,120-121,123,129-130)..... 1

Point II
DEFENDANTS FAIL TO REBUT THE LEGAL AUTHORITIES THAT SHOW UNITED'S ABUSE OF MONOPOLY POWER - THE ATTEMPT TO FIX THE PRICE BY THREATS, CARRIED OUT, TO ABANDON TIQUISATE UNLESS IRCA REDUCED ITS $130 FAIR RATE - WAS A PROXIMATE CAUSE OF INJURY TO IRCA'S BUSINESS OR PROPERTY (CAG TERMINATED ITS SHIPMENTS (PMB 107-138)..... 3

A. United's Monopolization of Guatemala (PMB 49-53) 4

B. Defendants' Arguments Fail To Rebut Plaintiff's Showing That There Was An Abuse Of Monopoly Power..... 9

C. A Significant Reason For United's Closing Of Tiquisate Was To Maintain Its Monopoly Or To Foreclose Competition (PMB 123-126, 54-59, 52-53, 62-63)..... 15

D. Arguendo, If Material, Plaintiff Proved That The Closing Of Tiquisate Was Not Motivated By Legitimate Business Motives..... 20

1. Landed Cost at United States Ports (PMB 65-73)..... 22

2. The 1961 Miller Report (PMB 83-89)..... 25

3. Valery Experimental Plots at Tiquisate Produced Excellent Yields (PMB 73-78); Boxing and Prices (PMB 78-81); Blowdowns (PMB 81, 74-77); The Political Climate in Guatemala (PMB 81-83); The Carpenter Report (PMB 89-92)..... 25

4. Tiquisate Was The Only Company Owned Division Closed (PMB 92-93)..... 25

5. United Terminated Negotiations With Chalk (PMB 20-37)..... 25

Table of Contents

Page No.

6. United Did Not Seriously Attempt To Sell Tiquisate As A Going Concern To Others (PMB 37-39)..... 27

E. Injury From Wrongful Restriction And Termination Of The CAG Traffic (PMB 150-155)... 29

F. Injury To IRCA From Wrongful Restriction And Termination Of CAG's Shipments During The Recovery Period From Pre-Statutory Period Antitrust Violations (PMB 155-156)..... 33

G. IRCA Has Standing To Sue With Respect To United's (CAG's) Restriction And Then Termination Of Its Shipments Over IRCA (PMB 162-164) 35

H. IRCA's Transport Of Bananas From Western Guatemala To Barrios For Export To The United States Was "Part Of The Trade Or Commerce ... With Foreign Nations" Under §2 Of The Sherman Act; United's Violations Of §2 Of The Sherman Act Affected The United States' Foreign Commerce..... 37

Point III

THE DISTRICT COURT'S COMPLETE FAILURE TO RECOGNIZE THAT THE PER SE VIOLATIONS OF §1 OF THE SHERMAN ACT RESTRICTED, FORECLOSED AND SUPPRESSED COMPETITION - DEMONSTRATES THAT ITS FINDINGS OF FACT WERE CLEARLY ERRONEOUS..... 38

A. Defendants' Arguments Are Immaterial And Irrelevant To The Plain Meaning Of The Contracts Which, On Their Face, Required IRCA To Discriminate In Favor Of United (CAG) On Equipment For Shipping Bananas (PMB 95-100, 110-111, 142-145)..... 39

B. Discrimination On The Line Haul Banana Rate (PMB 93-95)..... 42

C. Discrimination On The Line Haul Import Rate (PMB 95)..... 43

D. Discrimination On Wharfage Charges (PMB 101-104) 44

E. Discrimination In Practices And Services At The Pier (PMB 104-106)..... 44

F. Injury From Wrongful Restriction, Foreclosure And Suppression Of Competitive Shippers (PMB 156-162)..... 44

Table of Contents

	Page No.
G. IRCA Has Standing To Sue With Respect To The Restriction, Foreclosure And Suppression Of Competitive Shipments Over IRCA (PMB 164-165)	47
H. The Documentary Evidence Is Overwhelming In Support Of The District Court's Assumption That United And CAG Come Within The Inter-corporate Conspiracy Doctrine (I 250A, ftn. 13, PMB 139-140).....	49
Point IV DEFENDANTS IMPLICITLY CONCEDE (DMB 58 ftn.) THAT THE DISTRICT COURT (I 230A) ERRED AS A MATTER OF LAW IN DISMISSING THE ACTION ON THE GROUND THAT "THE THREAT OF COMPETITION IS MEASURED AT THE TIME OF SUIT" IN A PRIVATE DAMAGE ACTION UNDER §7 OF THE CLAYTON ACT (PMB 147-149).....	52
Point V DEFENDANTS FAIL TO REBUT PLAINTIFF'S SHOWING THAT THE COURT ERRED AS A MATTER OF LAW ON ITS COLLATERAL ESTOPPEL RULINGS (PMB 167-170).....	55
Point VI THE COURT ERRED AS A MATTER OF LAW IN EXCLUDING CERTAIN DOCUMENTARY EXHIBITS.....	58
Point VII DEFENDANTS FAIL TO REBUT THE LAW THAT UNITED, THE FIDUCIARY CONTROLLING IRCA, HAD THE IMPLICIT OBLIGATION TO BUY IRCA'S SERVICES THROUGH DECEMBER 31, 1967 WHERE IRCA HAD THE EXPRESSED OBLIGATION TO CARRY ALL CAG BANANAS TENDERED THROUGH DECEMBER 31, 1967 (PMB 170-175).....	58
CONCLUSION.....	60

Table of Cases

	Page No.
American Banana Co. v. United Fruit Co., 166 F2d 261 (C.A.2), aff'd 213 U.S. 347	46
Ark Dental Supply Co. v. Cavitron Corp., 461 F2d 1093 (C.A.3)	52
Automatic Canteen Co. v. Federal Trade Commission, 346 U.S. 61	43
Beckman v. Walter Kidde & Co., 316 F.Supp.1321 (E.D.N.Y.) aff'd, 415 F2d 593 (C.A.2), cert. denied, 408 U.S. 922	50,52
Bendix Corp. v. Balax, Inc., 471 F2d 149 (C.A.7), cert. denied, 414 U.S. 819	30
Coniglio v. Highwood Services, Inc., 495 F2d 1286 (C.A.2)	36
Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690	29,48
Dart v. Parke, Davis & Co., 344 F2d 173 (C.A.4)	14
Eastman Kodak Co. v. Southern Materials Co., 273 U.S. 359	10,11,12
Evergreen v. Nunan, 141 F2d 927 (C.A.2)	57
Fashion Originators Guild v. Federal Trade Comm'n, 312 U.S. 457	1
Fortner Enterprises, Inc. v. U.S. Steel Corp., 394 U.S. 495	36,52
GAF Corp. v. Circle Floor Co., 463 F2d 752 (C.A.2)	37,53
Gamco, Inc. v. Providence Fruit & Produce Bldg., 194 F2d 484 (C.A.1)	27
Goldfarb v. Virginia State Bar, __U.S.__, 44 L.Ed.2d 572 (decided June 16, 1975)	11,12,36
Gottesman v. General Motors Corp., 414 F2d 956(C.A.2)	53
Gulf Oil Corp. v. Copp Paving Co., Inc., 419 U.S.186	54
Hilton Hotels Corp. v. U.S., 467 F2d 1000 (C.A.9)	1
House of Materials v. Simplicity Pattern Co., 298 F2d 867 (C.A.2)	14

Table of Cases

	Page No.
Joseph E. Seagram & Sons Inc. v. Hawaiian Oke & Liquors, Ltd. 416 F2d 71 (C.A.9).....	52
Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211.....	50,51
Klinger v. B & O R.R., 432 F2d 506 (C.A.2).....	33,59,60
Klor's v. Broadway-Hale Stores,359 U.S.207.....	1
Kreager v. General Electric Co., 497 F2d 468 (C.A.2) cert. denied, 419 U.S. 865.....	7
Long Island Lighting Co. v. Standard Oil Co., Docket Nos. 75-7177, 75-7178 (C.A.2, Aug. 22, 1975) (Slip Op. at 5733).....	11,12,35
Lorain Journal v. U.S., 342 U.S. 143.....	10,11,12
Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219.....	2,3,9,11,12
Minn. Bearing Co. v. White Motor Corp., 470 F2d 1323 (C.A.8).....	52
Nassau County Ass'n of Ins. Agents, Inc., v. Aetna Life & Cas. Co., 497 F2d 1151 (C.A.2).....	47
Perma Mufflers v. Int'l Parts Corp., 392 U.S. 134..	51
Ring v. Spina, 148 F2d 647 (C.A.2).....	2
Ripley v. International Railways of Central America, UF, 8 AD2d 310, 188 NYS2d 62 (1st Dept. 1959) aff'd 8 NY2d 430, 209 NYS2d 289, 171 NE2d 443 (1960)...	passim
SCM Corp. v. Radio Corp. of America, 407 F2d 166 (C.A.2) cert. denied, 395 U.S. 943.....	36
Sanib v. United Fruit Co., 135 F.Supp. 764.....	51
Steiner v. 20th Century Fox Film Corp., 232 F2d 190 (C.A.9).....	8,9,12
T.W.A. v. Hughes, 449 F2d 51 (C.A.2) rev'd on other grounds, 409 U.S. 363.....	36,47,48,53
Telex Corp. v. International Business Machines Corp., 510 F2d 894 (C.A.10).....	19
Thomsen v. Cayser, 243 U.S. 66.....	17

Table of Cases

	Page No.
U.S. v. Aluminum Co. of America, 148 F2d 416 (C.A.2)	1,5,7,8,9
United States v. American Building Maintenance Industries, 43 U.S.L.W. 4838	54
United States v. Borden Co., 370 U.S. 460	43
U.S. v. Genl. Motors Corp., 121 F2d 376 (C.A.7)	52
U.S. v. Griffith Amusement Co., 334 U.S. 100	9,10,11,12, 13,16,17
United States v. Grinnell Corp., 384 U.S. 563	4,6,7,15
United States v. Paramount Pictures, Inc., 334 U.S. 131	6
United States v. Patten, 226 U.S. 525	17
U.S. v. Reading Co., 253 U.S. 26	40
U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150, reh. denied, 310 U.S. 658	2,19
United States v. Trenton Potteries Co.,273 U.S. 392.	1
United States v. United Shoe Mach. Corp., 110 F.Supp. 295 (D.Mass.), aff'd per curiam 347 U.S. 521	5
United States v. Yellow Cab Co., 332 U.S. 218	51,55
Warner & Co. v. Black & Decker Mfg. Co., 277 F2d 787 (C.A.2)	8,9,12
Woods Exploration & Proc. Co. v. Aluminum Co. of America, 438 F2d 1286 (C.A.5)	52
Zenith Corp. v. Hazeltine, 395 U.S. 100	35,45,46,47
Zenith Corp. v. Hazeltine, 401 U.S. 321	35,45
Other Authorities	
Von Kalinowski, Vol. 1, Antitrust Laws and Trade Regulation §6.02[3], pp. 94-105; pp.5-41,49,51,65; §8.01, p.3; §8.02[4], pp.56-58	1,4,5,8, 10,54
Sherman Act, §§1 and 2	passim
Clayton Act, §§4 and 7	passim

Notes on References

1. There are four volumes of the Appendix but five books - Volume II is divided into two books; plaintiff's exhibits are in Volume II(1) and Volume II(2) and are referenced by volume (not book) and page number, i.e. (II 727A); defendants' exhibits are in Volume III and are referenced by volume and page number, i.e. (III 920A); plaintiff's exhibits for identification are also contained in Volume III; Volume IV contains excerpts of the trial transcript as designated by defendants.

2. The District Court's findings are referred to by Volume I, page and then finding number, i.e. (I 255A, 6); the findings of fact from the prior New York State Court action "Ripley" are referred to by Volume I, page and then finding number which is always preceded by a letter, i.e. (I 125, B173).

3. Emphasis is supplied throughout unless otherwise indicated.

4. United Brands Company (hereafter "United" or "UF") was formerly named United Fruit Company and is sometimes intended to include its wholly owned subsidiary, Compania Agricola de Guatemala (hereafter "CAG" or "Agricola").

5. District Court is sometimes referred to as the Court.

6. Plaintiff's exhibits are PX; Defendants' exhibits are DX and trial transcript is TR.

7. PMB is plaintiff-appellant's main brief here.
DMB is defendants-appellees' answering brief here.
DB is defendants' main brief below (Doc. No. 183).
DRES is defendants' response to plaintiff's answer below (Doc. No. 178).
REPPF is defendants' reply to plaintiff's proposed findings of fact and conclusions of law below (Doc. No.186).

REPLY BRIEF FOR PLAINTIFF-APPELLANT

Point I

THE DEFENDANTS-APPELLEES HAVE NOT REFUTED PLAINTIFF'S POSITION THAT IT WAS ERROR OF LAW FOR THE DISTRICT COURT TO LEGALLY EXCUSE DEFENDANT UNITED'S ANTITRUST VIOLATIONS ON THE GROUND (ARGUENDO) OF A LEGITIMATE BUSINESS REASON (PMB 114, 116-117,120-121, 123, 129-130).

Plaintiff established that United monopolized shipments of bananas from Guatemala to the United States and also that United abused its monopoly power in attempting to fix the price it would pay IRCA for its services, both violations of the antitrust laws. Plaintiff contended in its main brief (PMB 114, 116-117, 120-121, 123, 129-130) that the District Court erred as a matter of law in holding (arguendo) that United's legitimate business motive in closing Tiquisate legally excused its antitrust violations. Defendants cite no cases to support the Court's holding. The District Court's opinion was squarely contra to Fashion Guild, Aluminum Co. of America, Klor's, Trenton Potteries, and Hilton Hotels Corp., all cited in plaintiff's main brief (PMB 114, 116-117, 120-121, 123, 129-130).

In the recognized text on antitrust, von Kalinowski, Vol. 1 Antitrust Laws and Trade Regulation, §6.02[3], pp. 99-100,

states: "Since 1927, when the Supreme Court first described price-fixing as a restraint which was in itself unreasonable, the courts have consistently refused to permit even a showing that, in given circumstances, price-fixing might have some economic justification [citing inter alia, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, reh. denied, 310 U.S. 658 and Ring v. Spina, 148 F2d 647 (C.A.2)]." Clearly, price fixing aimed at suppliers (IRCA) is as wrong as price fixing aimed at customers (Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, PMB 116, ftn.). Therefore, monopolist United's attempt to fix the price it paid IRCA for its service may not be excused on the ground of economic justification.

Defendants do not challenge plaintiff's analogy that if United and Standard conspired to fix the price they would pay IRCA and attempted to justify their price fixing conspiracy on the claim that it was better to grow bananas in other countries, the Court would reject such a defense as a matter of law (PMB 116-17). The same result follows where monopolist United attempted to fix the price through a threat of abandonment, carried out (PMB 116-118). The facts here are a fortiori where United-CAG constituted the conspiracy (infra, 49-52). Therefore, the District Court committed clear error of law in excusing United's violations of the antitrust laws based on its alleged "legitimate business motives."

Point II

DEFENDANTS FAIL TO REBUT THE LEGAL AUTHORITIES THAT SHOW UNITED'S ABUSE OF MONOPOLY POWER - THE ATTEMPT TO FIX THE PRICE BY THREATS, CARRIED OUT, TO ABANDON TIQUISATE UNLESS IRCA REDUCED ITS $130 FAIR RATE - WAS A PROXIMATE CAUSE OF INJURY TO IRCA'S BUSINESS OR PROPERTY (CAG TERMINATED ITS SHIPMENTS) (PMB 107-138).

Defendants-Appellees fail to come to grips with Point I of plaintiff's brief (PMB 107-138) and thus fail to refute the applicable legal authorities on United's "abuse of monopoly power" in attempting to fix the price it would pay to a supplier.

Defendants, in no way, refute the Court's findings of fact that United threatened IRCA that it would abandon western Guatemala unless the "Ripley judgment required rate of $130" (I 325A, 177) was reduced to $90. IRCA refused (PMB 12-20). Additional unrefuted facts are: United had an illegal monopoly in Guatemala (PMB 49-53, 107-113) and United carried out its threat by abandoning Tiquisate and terminating its banana shipments over IRCA from western Guatemala in July 1964. Therefore United, the monopolist, as a matter of law, was attempting to fix the price it would pay its supplier by exercising its monopoly power (Mandeville, supra). United also acted in concert with CAG.

United's antitrust violation was a proximate cause of injury to IRCA's business or property, to wit, CAG terminated its shipments over IRCA. A plainer case of injury flowing from an antitrust violation would be hard to find.

Hence, the District Court erred as a matter of law, in failing to find for plaintiff (PMB 130); but, in addition, plaintiff also proved that a significant reason for United's abandoning Tiquisate and terminating its shipments from western Guatemala was to maintain its monopoly in Guatemala or Central America or to foreclose competitors from Tiquisate (PMB 123-128, 54-59, 49-53, 62-63).

A. United's Monopolization in Guatemala (PMB 49-53)

There are three approaches to proof of monopolization. In the first approach, proof is required of the following:

> "(1) the possession of monopoly power in the relevant market and
>
> (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident."*

As per Grinnell, supra, at 576 n.7, the second element of the offense, "the willful acquisition or maintenance of that [monopoly] power," is established by proof of "unlawful and exclusionary practices" by which "monopoly power was consciously acquired" (DMB 18).

---

* United States v. Grinnell Corp., 384 U.S. 563, 570-1, cited by defendants (DMB 17). Von Kalinowski, in Vol. 1, supra, §8.01, p.3 refers to the second element as "an intent to exercise such power". He further stated:

> "The requisite intent for the purpose of proving the offense of actual monopolization need not be a specifically stated goal, but may be inferred from unlawful methods by which the power of market control has been obtained, maintained, or used, or from a 'willful,' 'deliberate,' or 'conscious' acquisition or retention of that power."

A second appraoch is called "implied intent in actual monopolization", which as per von Kalinowski, in Vol. 1, supra, §8.02[4], pp. 56-58,

> "is to be found in those cases in which the requisite intent is inferred from (1) the existence of monopoly power in the relevant market in conjunction with (2) the maintenance of that power by conscious and willful business policies which inevitably result in the exclusion or limitation of actual or potential competition. Where such factors exist, no unlawful or unfair practices would have to be shown; instead, the existence of the requisite intent would be presumed ...
>
> "That approach found its most forceful expression in the landmark case of United States v. Aluminum Co. of America. The opinion of Judge Learned Hand clearly stated that an enterprise has monopolized in violation of Section 2 if, regardless of its intent, it has achieved or maintained a monopoly by maneuvers which, though 'honestly industrial,' are not economically inevitable but are rather the result of the free choice of business policies."

A third approach is referred to in United States v. United Shoe Mach. Corp., 110 F.Supp. 295, 342 (D. Mass. 1953), aff'd per curiam 347 U.S. 521; the Court made reference to the broadest approach to the issue of "implied intent in monopolization" and stated:

> "Indeed the way in which Mr. Justice Douglas used the terms 'monopoly power' and 'effective market control', 334 U.S. 100, 107, lines 2 and 6, 68 S.Ct. 941, at page 945, and cited Aluminum suggests that he endorses a third and broader approach, which originated with Judge Hand. It will be recalled that Judge Hand said that one who has acquired an overwhelming share of the market 'monopolizes' whenever he does business, 148 F.2d at page 428, column 1, apparently even if there is no showing that his business involves any exclusionary practice."

Plaintiff demonstrated that the undisputed facts prove United's monopolization* in Guatemala, even under the most stringent standard set forth in Grinnell, supra. On the first element, monopoly power in the relevant market, the Court assumed that the relevant market was "the importation of bananas into the United States solely from Guatemala ..." (PMB 49-50); a sub-market was the shipment of bananas from the western side of Guatemala to Barrios for shipment to the United States (PMB 49-50).

The defendants concede (DMB 63) that "the Courts have inferred monopoly power" where the share of the relevant market was in "the range of 70%** - 100%." Thus United, with over 72%, possessed monopoly power in the relevant markets of Guatemala. For the period 1954 through 1961, United had over 72% of banana shipments from western Guatemala via IRCA to Barrios for shipment to the United States*** and practically 100% of the shipments for the period 1962 through 1964 (calculated from App. A of PMB). Since it was undisputed that United exported to ports in the United States substantially all of the bananas carried over IRCA from eastern Guatemala (PMB 53, App. C), then United's monopoly over banana shipments from eastern and western Guatemala via IRCA to Barrios for shipment to the United States

---

* The monopoly was so clearly established that the District Court assumed it (PMB 49).

** United States v. Paramount Pictures, Inc., 334 U.S. 131, 167.

*** In certain years United's share of that market dropped below 70% but for the entire period it was over 72% (PMB, App. A).

was 75% for the period 1954 through 1961* and practically 100% for the period 1962 through 1969 (PMB 52-53, calculated from App. A and C).

Plaintiff proved United's general intent to gain monopoly power in Guatemala by "unlawful and exclusionary" practices as in Grinnell, supra, to wit, the discriminatory rate and service structure it imposed upon IRCA through its control of, stock interest in, and contracts with, IRCA (PMB 8-12, 93-111, 138-149).

This Court in U.S. v. Aluminum Co. of America, 148 F2d 416, 432 (C.A.2), stated, in full context**:

> "In order to fall within §2, the monopolist must have both the power to monopolize, and the intent to monopolize. To read the passage as demanding any 'specific' intent, makes nonsense of it, for no monopolist monopolizes unconscious of what he is doing. So here, 'Alcoa' meant to keep, did keep, that complete and exclusive hold upon the ingot market with which it started. That was to 'monopolize' that market, however innocently it otherwise proceeded. So far as the judgment held that it was not within §2, it must be reversed.

Accordingly, the District Court erred as a matter of law in holding that the plaintiff had to prove United had a specific "intent" (I 222A) to violate the antitrust laws (PMB 126-127).

---

* In only one year, 1957, United's share of that combined eastern and western Guatemala market dropped below 70% but for the entire 1954-1961 period it was 75% (PMB 52-53, App. A and C).

** Kreager v. General Electric Co., 497 F2d 468, 471 (C.A.2), cert. denied, 419 U.S. 861 (1974), cited by defendants (DMB 18), quoted from Aluminum, is not to the contrary.

Under the second approach in Aluminum, as per von Kalinowski, supra, "regardless of its intent", an "enterprise has monopolized in violation of Section 2 if ... it has achieved or maintained a monopoly by maneuvers which, though 'honestly industrial [legitimate business reasons]', are not economically inevitable but are rather the result of the free choice of business policies." Arguendo, even if the abandonment of Tiquisate was for "legitimate business reasons", nonetheless it was "the result of the free choice of business policies" as found by the District Court, namely, the phaseout of Tiquisate was "part of the plan" to eliminate United's purchases in Ecuador and concentrate 100% of its supply in Central America (PMB 55), which meant United increased and solidified its monopoly in Central America.

Therefore, plaintiff, on the Court's findings of fact and on undisputed facts, proved both elements of the offense of monopolization of the relevant market of Guatemala under §2 of the Sherman Act. Based on the District Court's finding of facts, that United threatened to abandon Tiquisate unless IRCA reduced its $130 rate to $90, IRCA's refusal (PMB 12) and United's subsequent abandonment, then the Court erred as a matter of law in failing to hold that United abused its monopoly power in attempting to fix the price it would pay IRCA (Warner & Co. v. Black & Decker Mfg. Co., 277 F2d 787 (C.A.2) (PMB 113); Steiner v. 20th Century Fox Film Corp., 232 F2d 190 (C.A.9) and Mandeville, supra, (PMB 116, ftn.)).

B. Defendants' Arguments Fail To Rebut Plaintiff's Showing That There Was An Abuse Of Monopoly Power

Defendants state (DMB 21): "plaintiff cites no case holding that an attempt to bargain down a price sought by a supplier of services can be considered a monopolistic act as a matter of law." Defendants ignore the fact that we are here dealing with a monopolist's attempt to fix a price by threatening to withdraw its business. Such cases are Mandeville, supra (a conspiracy* of California sugar refiners to fix the prices they would pay for sugar beets grown in California (PMB 116, ftn.); Warner & Co., supra, (a conspiracy to attempt to fix a price charged to a customer, instead of as here, to a supplier, as for all practical purposes the same (PMB 113)); Steiner & Co., supra, (a successful threat which gained a reduction in the rent from a supplier landlord (PMB 117, 163)); Aluminum, supra, (Alcoa abused its monopoly power by charging its customers "unfairly high prices" while United abused its monopoly power by attempting to fix an unfairly low price for the services it would purchase from its supplier, IRCA, also see the quote from Aluminum (PMB 117)); U.S. v. Griffith, 334 U.S. 100 (defendants used their monopoly power as exhibitors of films in towns in which they had a 100% monopoly to gain exclusive film rights in towns where other theatres were present and thus threatened their supplier of films in order to gain

* As demonstrated, at least the same legal standard applies to a conspiracy under §1 and to a monopolist attempting to fix a price under §2 of the Sherman Act (PMB 116-118).

additional benefits, which is tantamount to a reduction in price; here, United did the same, with its 100% monopoly in Guatemala, it used its monopoly power to threaten IRCA in an attempt to get additional benefits, namely, a reduced price. In Griffith and here the monopolists were both seeking a reduced price or the equivalent from their supplier). A monopolist's price fixing* under §2 of the Act is analogous to price fixing cases as per se violations under §1 of the Act (see 1 von Kalinowski, Antitrust Laws & Trade Regulation, §6.02[3] pp. 94-105).

Lorain Journal Co. v. U.S., 342 U.S. 143 (cited by plaintiff, PMB 112) is conceded to show a monopolist's refusal to deal** with its customers to restore monopoly power and eliminate competition (DMB 20). In Eastman Kodak Co. v. Southern Materials Co., 273 U.S. 359, (cited by plaintiff, PMB 112, and contra defendants, DMB 20), Kodak "refused to sell to plaintiff

---

* Thus plaintiff refers to a monopolist's attempt to fix prices it pays a supplier, not as defendants state "a firm with a large market share" (DMB 22). Furthermore, defendants state (DMB 22) the District Court found that IRCA's "demands may result from the fact that it is itself a monopoly (Op. at I 218A ..."; but defendants by omissions distort the Court's statement in two major respects. The Court stated: "Perhaps it was because IRCA was itself a monopoly, armed with a judicial decree on rates, that it assumed a position of power which it did not really possess."

** Defendants distinction of the boycott and refusal to deal cases (DMB 20) cited by plaintiff (PMB 112-118) is that "United never asked anyone not to deal with IRCA" (DMB 20, ftn.). But United begs the question since plaintiff contends that United itself boycotted and refused to deal with IRCA and also that United acted in concert with its wholly owned subsidiary, CAG.

at wholesale prices,* (DMB 20) while here, United the monopolist, refused to buy from IRCA at "the Ripley judgment required rate of $130 per banana carload" (quoted part from Finding 177, I 325A). Whether a monopolist is buying or selling when it fixes prices is immaterial.

Defendants also urge the invalid distinction (DMB 21) that "unlike the plaintiffs in Kodak and Lorain Journal, IRCA was not a competitor in the alleged monopolized market so that even if the closing was aimed at IRCA, it would not necessarily exclude competition in the banana business." But that distinction is without merit; in Mandeville,** supra, an attempt to fix a supplier's price stated a cause of action even though plaintiffs and defendants were not competitors; in Griffith, the threatre distributors and exhibitors were not competitors. In Goldfarb v. Virginia State Bar, U.S. , 44 L.Ed.2d 572 (decided June 16, 1975), the Supreme Court held that consumers (purchasers of homes paying lawyers fees for title examinations) could recover under §4 of the Clayton Act for violation of §1 of the Sherman Act (combination to impose minimum fees for title examinations). Goldfarb conclusively rejects United's contention that §4 of the Clayton Act is confined to recovery of damages for "competitive" injuries. In Long Island Lighting

* It is noteworthy that plaintiff had standing to sue in Eastman Kodak, supra, where defendants refused to sell to plaintiff except at unfair prices; thus here, IRCA had standing to sue where United refused to purchase from IRCA except at unfair prices; see infra, pp. 35-37.

** In Mandeville, supra (PMB 116, ftn.) the Supreme Court sustained a complaint against California sugar refiners who conspired to fix the prices they would pay for sugar beets grown in California. The sugar beet growers were not competitors of the refiners but like here, were suppliers.

Co. v. Standard Oil Co., Docket Nos. 75-7177, 75-7178 (C.A.2, Aug. 22, 1975) (Slip Op. at 5733), this Court reversed the dismissal of the second count which charged a "conspiracy [of supplier oil companies] to reduce supply and inflate prices charged to electric utilities". The electric utilities were not competitors of the oil companies.

In Kodak, contra defendants (DMB 21), defendant refused to sell to plaintiff who was its customer (and happened also to be a competitor) except at unfair prices. In Lorain Journal, contra defendants (DMB 21) plaintiff was the United States and not a competitor, but certainly the customers whose ads were refused were not competitors with the defendant newspaper and would have had standing to sue in a civil suit. In Steiner, supra, and Warner, supra, the parties were not competitors. Here United attempted to fix the price it paid IRCA, its supplier, like Mandeville, Steiner and Griffith and is analogous to fixing prices to customers like in Goldfarb, Lilco, Warner and Kodak.

Defendants misstate plaintiff's position (DMB 20):

> "To hold that such a closing [for legitimate business reasons] is a per se illegal boycott, as plaintiff contends, would mean that a business enterprise must continue all aspects of its operations without regard to their economics because to do otherwise would constitute, as a matter of law, a boycott of all suppliers of services and materials to the closed operation."

Defendants thus ignore the fact that plaintiff's theory is based on "United, the monopolist" not just "a business enterprise" and plaintiff has demonstrated an abuse of monopoly power,

namely, an attempt to fix the price United the monopolist would pay its supplier under a threat of abandonment of its west coast operations; thus plaintiff's legal contention is completely different from defendants' strawman.*

Contra United (DMB 20), the fact that it continued to use IRCA's rail service from eastern Guatemala does not excuse its abuse of monopoly power in attempting to illegally fix the price it would pay IRCA for its shipments from western Guatemala.

Defendants refer (DMB 21) to the District Court's opinion that "no promise [was made by United] that if the rates were lowered satisfactorily Tiquisate would be continued indefinitely**as a banana operation." (I 217A). To prove an abuse of monopoly power, plaintiff did not have to prove that if IRCA capitulated, United promised to stay in Tiquisate "indefinitely". But, the uncontroverted evidence did show that if IRCA lowered the rate to a satisfactory level, United would stay and continue its operations at Tiquisate (PMB 18-19); that proof is totally inconsistent with the allegation that Tiquisate was the worst place to grow the Valery.

* United then makes bootstrap distinctions, (DMB 22) that fall of their own weight, namely, that because United already had a 100% monopoly (gained by predatory practices) "competition was in no way foreclosed by United's bargaining on rates" and "United only sought a lower rate, not a rate that favored it over competitors. (Op. at I 223A)". That argument has been fully answered (PMB 119-120); in net effect, defendant United claims it should not be deprived of the economic benefits that flow to a monopolist as a result of its violation of §2 of the Act. As held in Griffith, supra, 108: "If monopoly power can be used to beget monopoly [or here, fix prices], the Act becomes a feeble instrument indeed."

** Omitted by defendants in quoting from the Court's decision (DMB 21).

Contra defendants (DMB 21), by closing Tiquisate in the way it did, namely tearing up the rails and removing the irrigation equipment (PMB 38-39), United closed down Tiquisate with the distinct purpose of preventing competitors from producing there, and in not selling to Chalk, making certain that up to 9,000,000 stems of competitive fruit annually were not shipped from western Guatemala via IRCA to Barrios for export to the United States (PMB 123-126, 52-53, App. C, 28-32, 62-63). Therefore, United's closing was clearly in maintenance of its Guatemalan monopoly, which continued to the extent of 100% in eastern Guatemala and also in maintenance of its monopoly in Central America (PMB 123-126, 54-59).

Plaintiff contends that since it proved United's monopoly in Guatemala and the Court assumed that monopoly, the District Court should have then ruled in plaintiff's favor, as a matter of law, in establishing the "abuse" of monopoly power in making and carrying out its threat to IRCA in United's attempt to fix the price it paid IRCA* (PMB 130). Accordingly, contra defendants (DMB 23), for plaintiff to prevail, it was unnecessary to show, in addition, that a significant reason

---

* Defendants' reliance (DMB 22-23) on House of Materials v. Simplicity Pattern Co., 298 F2d 867 (C.A.2), Dart v. Parke, Davis & Co., 344 F2d 173, 185 (C.A.4) and other cited cases (DMB 23, ftn.) is misplaced. They are illustrations of the elementary rule that a unilateral, non-monopolistic refusal to deal, for any or no reason, does not violate the antitrust law. Plaintiff has never contended otherwise. It does not assert that any and every reprisal is unlawful. However, the facts and law demonstrate that United-CAG's restriction and elimination of Tiquisate shipments by them was an unreasonable restraint of trade, monopolistic, and an abuse of monopoly power, in violation of §§1 and 2 of the Sherman Act and §7 of the Clayton Act.

for closing Tiquisate was to maintain its monopoly or to foreclose competition; but, in any event, plaintiff also proved that (PMB 123-126, 54-59, 52-53, 62-63) and it is next discussed.

C. A Significant Reason For United's Closing Of Tiquisate Was To Maintain Its Monopoly Or To Foreclose Competition (PMB 123-126, 54-59, 52-53, 62-63)

Defendants (DMB 18) rely on a conclusion of law by the District Court (I 361A, C6) which is limited to the "United States market."*

Defendants do not even attempt to refute the facts and statistics set forth in plaintiff's brief entitled "United's monopoly in Central America" (PMB 54-59). Thus, with over 70% of the Central America supply (PMB 54, ftn., 56), United had monopoly power in Central America and the general intent to maintain that monopoly, as evidenced by the same "unlawful and exclusionary practices" by which "monopoly power was consciously acquired" in Guatemala (Grinnell, supra, 576, and n.7).

Plaintiff's brief demonstrates that, in fact, the closing of Tiquisate was "part of the plan," as found by the District Court (I 302A, 139), whereby United "would limit its

* Conclusion of law No.11 (I 363A) is likewise limited to the United States market since it only refers to "importation of bananas" and conclusion of law No.5 (I 360A) is too broad since it does not identify any market (DMB 19).

production to certain areas in Central America" (PMB 55). Thereafter, it is undisputed that United did solidify its share of the Central America market by increasing it from 71% in 1964 to 76% in 1965, to 76% in 1966 and to 75% in 1967.* Success of United's plan to maintain its monopoly in Central America depended upon denial to competitors of access to Tiquisate's annual potential production of 9 million stems (PMB 57). Thus on the findings of fact by the District Court and the undisputed evidence, the effect of United's closing of Tiquisate was to maintain its monopoly in Central America (PMB 123-126).**

In addition, United does not refute the facts showing that one of United's significant purposes in not selling Tiquisate as a going concern was to foreclose competition (PMB 62-63, 54-59, 28-39).

Moreover, defendants do not deny the fact that after Tiquisate was closed,United continued its 100% monopoly over shipments from eastern Guatemala via IRCA to Barrios for export to the United States (PMB 49-53, App. C).

As a matter of law, even if we assume the absence of "a specific intent"to maintain its monopoly in Central America or Guatemala or to foreclose competitors from Tiquisate, United "is chargeable in legal contemplation with that purpose since the end result [maintaining its monopoly or foreclosing competition] is the necessary and direct consequence of what [it] did", namely, abandoning Tiquisate and selling off the land piecemeal to former employees and others for growing cotton (Griffith, supra,

---

* PMB 56

** The defendants (DMB 30) misquote the Court (at I 216A); the Court did not say that Sunderland was not "seeking ways to maintain alleged monopoly power."

at 108; see also U.S. v. Patten, 226 U.S. 525, 543; Thomsen v. Cayser, 243 U.S. 66, 85; PMB 115-116, 126-128).

The Court erred in not finding that Central America* was a separate relevant market, contra defendants (DMB 29 ftn.). The fact that the product "bananas" from Ecuador did compete generally in the United States market with bananas from Central America only demonstrates that the "product" relevant market was bananas. However, the geographical relevant market of sources of supply was as stated by plaintiff (PMB 134-138). Thus, once the high yielding Valery bananas could be produced in Central America and bananas from Central America enjoyed such a large ocean freight advantage over bananas from Ecuador (PMB 53-54), then bananas from Ecuador were not able to compete effectively against bananas from Central America in the United States market. Thus Ecuador was a separate geographical market (PMB 136).

Contra defendants (DMB 62, ftn.),the fact that the cost of water transportation from Honduras and Guatemala to United States ports was the same does not mean that each country was not a separate relevant market. It was United's control of, and contracts with, IRCA and United's requiring IRCA to discriminate in rates and services against United's competitors in Guatemala that gave United its monopoly on the shipment of bananas from western Guatemala to Barrios for export to the United States. Some of those discriminations continued into the recovery period (PMB 93-106). Thus the factors that gave

---

* Central America as identified by plaintiff excluded only bananas imported into the United States from Ecuador (PMB 53). Contra defendants, plaintiff contended below that United had monopoly power in Central America (Doc. No.185,p.101,¶207; Doc. No. 177, pp. 105-106).

United a monopoly in Guatemala were completely separate from the factors that effected United's share of the supply from Honduras for the United States market.*

Defendants (DMB 29 ftn.) fail to refute plaintiff's showing that United was "dumping" its Ecuador purchases on the East Coast of the United States at an out of pocket cash loss during the 1958 to 1960 period (PMB 42-44) even before United had firmly decided on the Valery.

Contra United (DMB 29, ftn.), plaintiff's cost analysis from United's exhibits included all costs, including depreciation as a part of the unit cost for Guatemala (III 1378A); furthermore, the documentary evidence shows that new plantings could have been made by United in Cocos at Guatemala for only $48 per acre** (PMB 45).

It was competition from Ecuador that drove United States prices down and caused United's sharp earnings drop (PMB 60) and not, as stated by United (DMB 30), that its costs were rising rapidly due to higher costs from developing new planting areas.

Contra defendants' implication (DMB 30), the Valery was not a superior product that United alone had developed and which was only available to United. The fact is that Standard Fruit Co. had developed a variety banana, the "Cavendish",

---

* For example, IRCA operated in Guatemala, not in Honduras, therefore United's relationship with IRCA could not have any bearing on United's share of the market in Honduras, which was substantially less than in Guatemala. United's share of the market for bananas exported to the United States and Canada from Honduras ranged from 45% to 58% for the period 1961 to 1963 (II 727A) while it was much higher for Guatemala, namely, 74% in 1961 and 100% in 1962 and 1963 (PMB, App. A and C).

** Moreover, the finding cited by United (DMB 29, ftn., I-288A, 102) only relates to investment by others, not United.

before United and was further advanced for commercial production than United (as conceded by Sunderland - TR 995-6), and United was trying to combine its Central America monopoly with the Valery to solidify that monopoly position. Instead of relying on its "business acumen", it was relying upon its traditional monopolistic practices, to wit, foreclose competition from Tiquisate's potential 9 million annual supply of Valery bananas.*

Defendants take the position that it had enough of a supply of bananas for the United States market (DMB 30-31) and therefore its phase out of Tiquisate was to limit the total supply of bananas** it decided to bring into the United States market. United's purpose was condemned by United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (PMB 121), which held that when a monopolist withdraws a "substantial part of the supply from a market" that is as "unlawful as an agreement to fix prices."

The fact that United had a monopoly over the Central America source of supply and that Central America's share of the United States market increased from 63% in 1965 to 70% in 1966, 73% in 1967 and 80% in 1968 (PMB 56) demonstrates that United even had monopoly power in the United States market.

---

* As two United vice presidents stated in 1964, their primary concern was that "planting of variety bananas by competitors nearer the market than Ecuador for the U.S. market could increase" (PMB 57), thus demonstrating that the Valery banana was not "a superior product" only available to United. On the contrary, it was an agricultural product available to competition and only monopolistic practices gave United advantages over its competition. Accordingly, on the facts here, Telex Corp. v. International Business Machines Corp., 510 F2d 894, 927 (C.A.10) in inapplicable (DMB 30).

** The Court stated that "with the advent of the Valery, United did not need all the divisions it had" (I 362A, C13(e)). Thus, a significant purpose in shutting down Tiquisate was in furtherance of United's monopoly, namely, by withdrawing a substantial part of its supply from a market (PMB 121).

Therefore, if required, plaintiff did establish that United's motive in closing Tiquisate was to maintain its monopoly or to foreclose competition.

D. Arguendo, If Material, Plaintiff Proved That The Closing Of Tiquisate Was Not Motivated By Legitimate Business Motives.

Arguendo, the Court erred as a matter of law in placing the burden of proof on plaintiff to show that United's closing of Tiquisate was not motivated by legitimate business reasons when it was United's burden to show the opposite (PMB 129-130). Defendants do not refute that proposition of law.

United relies (DMB 12) upon the testimony of three former United executives (Sunderland, Fox and Mason) and an executive then in the employ of United (van Diepen). It is noteworthy that all four of United's executive witnesses participated in the violations of the antitrust laws. Defendants refer to Sunderland as "a distinguished lawyer, who ... was one of the founders of the Antitrust Section of the American Bar Association" (DMB 12 ftn.). As such, Sunderland* was fully aware

* Sunderland, as President of United, knowing that this action was pending against his company, removed relevant papers from the files of United and took them with him, on his retirement, to his home in Arizona (TR 889-892); violated the consent antitrust decree by meeting with the President of Standard (PMB 104, second ftn.); denied receiving reports on competitors where his name actually appeared on the document as one to whom it was distributed (TR 1076-8; II 826A, PX 1494A erroneously identified at TR 1076 as PX 1500); denied receiving documents from Roddy with the "confidential legend" on them when they were addressed to him (TR 1021, cf. 1085-7); testified that the condition of Tiquisate was "sad" when he visited there in January 1960 (TR 670) but contemporaneous documents stated that the plantations at that time had a "clean, healthy appearance," and "an extremely heavy crop of nice looking fruit is just coming in" (PX 189, PX 498).

of his daily violations of the antitrust laws as President of United while United, on an annual basis, extorted millions of dollars from citizens of the western United States through United's monopolistic pricing of bananas in that market (PMB 63-65). Fox, Mason and van Diepen were all executive members of that same team. Sunderland was President of United in 1960 when it was "dumping" Ecuador bananas at the east and gulf coast ports of the United States on an out of pocket cash loss basis (PMB 43-44). Moreover, the incredible defense is that Sunderland and Fox lied to Chalk in 1963 about the status of Tiquisate but were telling the truth when they testified ten years later, in 1974 (PMB 73-75). Defendants' executive, van Diepen, a so-called expert, was conclusively shown to be a flim-flam artist (PMB 75-77). Defendants only answer (DMB 16, fn.) is to "stonewall" it; they did not even attempt to rebut plaintiff's analysis (PMB 75-77).

Defendants refuse to even discuss the evidence in support of the findings of fact* of the Court for the simple reason that in almost all cases it is the 1974 sworn ipse dixit of Sunderland, Fox, Mason or van Diepen. In sharp contrast, plaintiff's analysis of contemporaneous documents is contrary to such 1974 ipse dixit and therefore meets the applicable legal test, namely, "to reverse a finding it must appear from what the record does preserve that the witnesses could not have been speaking the truth, no matter how transparently reliable and honest they could have appeared";

---

* Furthermore, contra defendants (DMB 11) the Court did not "prepare 245 numbered findings of fact of its own ..."; of those findings, the Court merely adopted 172 findings of defendants as submitted by defendants and slightly modified another 35 findings as proposed by defendants.

Aluminum Co. of America, supra, at 433. In addition, as per the classic statement by Judge Learned Hand in Aluminum Co. of America, supra, "no monopolist monopolizes unconscious of what he is doing."

1. Landed Cost at United States Ports (PMB 65-73). Defendants made no serious attempt (DMB 14 ftn., 15 ftn., 16 ftn., 19) to refute the overwhelming documentary evidence that supported the District Court's assumption "that plaintiff's landed cost figures were accurate" (I 222A). Compare defendants meaningless generalizations (DMB 14-17) with plaintiff's comprehensive analysis of the documentary evidence (PMB 65-73). Thus defendants fail to refute plaintiff's showing (PMB 67-72) that a 1963 Miller study of Tiquisate ordered by Sunderland but which he ignored in his testimony, showed the Valery at Tiquisate was competitive with United's other divisions (PMB 67-72). Defendants ignore (1) Sunderland's and Fox's admission to Chalk that Tiquisate could produce 400 Valery stems per acre (PMB 68) and (2) the Valery experiment at Tiquisate which yielded substantially more than 400 stems per acre*. Defendants endorse the position of their flim-flam artist, van Diepen, which they label as "scientific" (DMB 16, ftn.). In fact, van Diepen's "scientific" assumptions were to compare production from 483 Valery stems planted per acre at Honduras with production from only 392 Valery stems planted per acre at Tiquisate (PMB 75-77);

* The Valery experiment at Tiquisate yielded 22.96 tons per acre per year (PMB 75, ftn.) and 400 stems only amounted to 16.4 tons per year (PMB 68).

that was comparing apples and oranges. But when placed on a comparable basis, production at Tiquisate was slightly higher (PMB 75-77).

The Roddy study (II 753A, PX 1108) is attacked by defendants (DMB 15-16, ftn.) because it is a "single sheet" of paper and it is "unsigned"; it was a fair inference that it was Roddy's study since it was similar to Roddy's study on Bananera (III 1383A-5A) and it was a single sheet because it contained the results of the study like the one on Bananera (III 1382A-3A). Defendants never produced Roddy at the trial to testify about his assumptions even though he was a former vice president of United. Roddy's study (PMB 66) thus showed that Tiquisate was competitive with United's other divisions as per other Roddy studies in evidence of Bananera, Bocas, Golfito and Armuelles (PMB 66-67). Roddy reported directly to Sunderland on his operation which included cost analyses (II 721A-3A).

Defendants contend (DMB 14, ftn.) that plaintiff

> "omits the facts that Fox's letter and the letter to which Sunderland was responding (II 430A) (a) assumed the possibility of 'shipping west', i.e. through a new port to be constructed on the Pacific side of Guatemala which later studies proved to be impractical."

To the contrary, plaintiff's quote from Fox's letter stated on the face of the brief (PMB 70, line 14) "shipping west". In addition, instead of omitting any references to "shipping west", plaintiff met it head on and stated (PMB 70):

> "Shipping west did not change the soil, the blow-downs, the amount of rainfall and other forces of nature now emphasized by defendants, out of all importance to their true status, as demonstrated by the statements of Sunderland and Fox in 1961 and 1962, which are far more credible than, and totally inconsistent with, their testimony of 1974."

Thus, after receipt of the 1961 Miller Report Sunderland stated that "Tiquisate is potentially one of our best divisions" and Fox stated that Tiquisate "fully boxed, shipping west, and built up from its present planting of 14,000 acres to 25,000 acre strength could easily become one of the most profitable in the company" (PMB 70).

Defendants further contend (DMB 14 ftn.) that the Sunderland and Fox statements were "premised on the assumption that Cocos bananas - another species with which the company was experimenting - would be wind-resistant and immune to Panama disease, which later proved to be erroneous." The simple answer is that the Valery was "wind-resistant and immune to Panama disease" and the premise of Sunderland's and Fox's statements was applicable to any variety banana that the company decided to place in commercial production. That is confirmed by Fox's letter to Chalk in November 1963 that Tiquisate could be planted with a "low-growing variety (i.e. wind-resistant) banana resistant to Panama disease" and concluded by stating "at one time Tiquisate was one of our profitable divisions and could be an even greater banana producer again with variety bananas" (PMB 74-75). Sunderland and Fox told Chalk in December 1963 that Tiquisate "would produce beautifully in the new banana", an obvious reference to the Valery and Sunderland stated further "You can have just as big a division as you want. There's all the land in the world there in Tiquisate ..." (PMB 74). Thus contra defendants, the contemporaneous documentary statements by Fox and Sunderland after

the receipt of the 1961 Miller report were of far greater significance than their 1974 sworn ipse dixit.

2. The 1961 Miller Report (PMB 83-89). Defendants simply retreat on the 1961 Miller Report (DMB 14, 19); they make no effort to even discuss plaintiff's comprehensive analysis (PMB 83-89) and thereby concede the accuracy of that analysis.

3. Valery Experimental Plots at Tiquisate Produced Excellent Yields (PMB 73-78); Boxing and Prices (PMB 78-81); Blowdowns (PMB 81, 74-77); The Political Climate In Guatemala (PMB 81-83); The Carpenter Report (PMB 89-92). Defendants made no attempt (DMB 19) to refute the overwhelming documentary evidence that demonstrates the Court's findings were clearly erroneous and thus concede the accuracy of plaintiff's analysis.

4. Tiquisate Was The Only Company Owned Division Closed (PMB 92-93). Again defendants made no attempt to refute the documentary evidence that established that Tiquisate was the only company owned division closed; therefore the Court's findings that other United divisions were closed pertained only to divisions that were 100% associate producer.

5. United Terminated Negotiations With Chalk (PMB 20-37). Monopolist Sunderland's 1974 sworn ipse dixit as to why United terminated negotiations with Chalk (DMB 27) is completely contrary to the contemporaneous documentary evidence analyzed by plaintiff

(PMB 27-37) which shows that the Court's findings are clearly erroneous. Contra United (DMB 26-28): in 1963, United's counsel conceded that Chalk initiated negotiations and that he "is very anxious to acquire United's assets" at Tiquisate (PMB 27); Chalk* made an offer by letter dated December 30, 1963 which United took seriously and called its meeting of January 9, 1974 to consider (PMB 31-35); the court overlooked United's concession that it terminated the Chalk discussions (PMB 35) and overlooked United's meeting of January 9, 1964 at which United decided not to "enter into negotiations with Mr. Chalk looking forward to the sale to him of assets ..." (PMB 35-37); Chalk had an independent means of financing the transaction by his controlled TCA Company which had an equity of over $8,000,000 (III 1167A, DX 376, p.63) and he did not come up with a total price because United aborted the negotiations (PMB 34-37); United misrepresented to Chalk by stating that Tiquisate could be built up to 9,000,000 stems of Valery for an additional investment of $9,000,000 instead of the true cost of $2,377,000 (PMB 86-88, 68, 23-24, 131); Chalk was not trying to get equipment, plant, distribution facilities and ships for nothing (PMB 31-34); there was no failure to meet the Consent Decree's requirements (PMB 26-37), a proposed negotiated sale to Chalk was never submitted to the Justice Department; United implicitly assumed Chalk would obtain Justice Department approval and called its January 9th meeting to consider whether to sell to him (PMB 26-37); and United's

* Excerpts of Chalk's deposition were introduced into evidence (PX 1528) and it more than touched on his negotiations with United (II 882A-7A, 890A-1A); it demonstrated his sincere interest in having Tiquisate continue to produce bananas by United, independents, IRCA or a Chalk organization so that IRCA "would not be deprived of the traffic" (II 882A).

documents never mentioned possible Justice Department objections (PMB 34-37).

United argues (DMB 27-28) that Chalk should have purchased the land and irrigation equipment from those who purchased from United*, but the only documentary evidence shows that United remoeved the irrigation equipment when it sold the land (II 427A, 432A, PMB 39) and United conceded (DMB 28-29) it transferred the irrigation equipment to Bananera.**

6. United Did Not Seriously Attempt To Sell Tiquisate As A Going Concern To Others (PMB 37-39). Defendants concede re the meeting with Ecuadorian Fruit (DMB 25-26) that "the Court recognized that even though a memorandum indicated that no division was specifically mentioned in United's offer, none was excluded." (See PMB 37-38). Thus, defendants' offer to sell Tiquisate boils down to the position that Tiquisate was not excluded as a division for sale at the meeting with Ecuadorian which was devoted to other unrelated subjects*** (II 767A-97).

---

* United argues that IRCA should have purchased Standard's plantations (DMB 28), but Standard abandoned its farms in 1961. For Chalk to have purchased that land in 1964 was indeed remote, and IRCA would not have purchased it in 1961 in order to compete with its best customer at the time, United.

** Significantly United also tore up 90 miles of tracks at Tiquisate (TR 372-4, PMB 39), thereby making certain that Chalk was foreclosed. Moreover, United's contention that Chalk should have purchased other vast acreage in western Guatemala is fully answered by Gamco, Inc. v. Providence Fruit & Produce Bldg., 194 F2d 484 (C.A.1), PMB 121-122.

*** Defendants quote (DMB 25) that it would "consider all prospective bidders" is misleading since it did not refer to Tiquisate but to United's future sale under the Consent Decree (II 788A); significantly that quote demonstrates that United made no mention of the immediate availability of Tiquisate even though its Board, within the previous two months, authorized the sale of Tiquisate's assets and even though United then knew about the excellent yields on the Valery at Tiquisate (PMB 38, 73-78).

United cites (DMB 25) Ecuadorian's alleged position in 1960 (PMB 133) with respect to Gros Michel which is totally immaterial and irrelevant to the new facts, including the "excellent" yields, on the Valery at Tiquisate in 1963 (PMB 73-78).

Contra United (DMB 24), there were specific restrictions in United's leases that foreclosed use of the land for growing bananas (PMB 38) and a document erroneously excluded from evidence (PMB 39 ftn.) demonstrates that it was United's policy to either retain its good banana lands or lease them for cotton growing or pastures to local farmers. The essence of that policy was continued into 1963, when Sunderland ordered studies of five alternatives for Tiquisate (III 1368A); none assumed the sale of Tiquisate as a going concern.* The land at Tiquisate was sold specifically to purchasers who intended to grow cotton (PMB 39), and its availability for sale was not publicized (II 428A).

Moreover, the United directors never authorized the sale of Tiquisate as a going concern (II 397A) even though the Court

---

* Defendants incorrectly state (DMB 25, ftn.) that plaintiff's "only" response to the West Indies inquiry (defendants incorrectly label it a "negotiation" (see III 1139A-40A)) was United's failure to produce a prospectus; in fact, defendants ignore two additional arguments (PMB 133), namely, that West Indies had a "real problem" as to how it could "swing such a deal" for a million dollars (I 345A, 229(d)) and United never attempted to contact West Indies about purchasing Tiquisate after its May 1963 meeting (PMB 133). Contra United (DMB 25, ftn.), the May 1963 study of Tiquisate (May 10, 1963, II 387A) was not even available to be included in the so-called "Prospectus" and since defendants failed to produce that prospectus, there is no way of knowing what it stated about Tiquisate. The memo of the meeting states (III 1140A) that United "did not furnish any written data covering production or operating costs." Arguendo, since it was defendants burden to establish its good faith attempt to sell Tiquisate as a going concern, it failed to meet its burden of proof by not producing the "prospectus."

found that the value of Tiquisate as a continuing and going concern "would be substantially over the salvage value" of $6,500,000 (I 349A, 235). Thus despite the fact that United would have realized "substantially" more by selling Tiquisate as a going concern instead of on a salvage basis, as it did, United opted for the salvage value approach.

E. Injury From Wrongful Restriction And Termination Of The CAG Traffic (PMB 150-155)

Contra defendants (DMB 49-52), the Court did not find that IRCA was not injured by United's restriction and then termination of its west coast shipments. Injury from such unlawful conduct was direct and most obvious. By United restricting and then terminating such shipments, IRCA lost the revenue from CAG's non-shipments that it would have had if CAG had continued shipping at $130 per car during the recovery period at the 1960 annual rate of shipments (at least), namely, 17,559 cars (PMB 151-55). The only evidence showed that IRCA would have profited by $5,089,000 during the recovery period from such non-CAG shipments (PMB 152). A plainer case of direct injury* from United's abuse of monopoly power would be hard to find.

Thus under Continental Co. v. Union Carbide, 370 U.S. 690, 697, 704, plaintiff proved "a loss, and a violation by defendant of the antitrust laws [abuse of monopolistic power in abandoning

* Defendants attempt to convert the above direct injury to IRCA from United's cessation of shipments due to United's abuse of monopoly power into an antitrust violation which, defendants contend, "by definition must restrain or exclude competition" (DMB 49), but that contention is without merit. Significantly, United's antitrust violations were the proximate cause of CAG's restriction and cessation of its shipments and that proves injury to IRCA.

Tiquisate after a threat in attempting to fix the price] of such a nature as to be likely to cause that type of loss."

Defendants contend (DMB 49) that plaintiff was required to prove "'loss of profit attributable to patronage withheld by the particular customer' as a result of the allegedly illegal conduct. Bendix Corp. v. Balax, Inc., 471 F2d 149, 163 (7th Cir.) 1972, cert. denied, 414 U.S. 819 (1973)." Arguendo, Bendix supports plaintiff's claim that IRCA's injury from United's abuse of monopoly power is the "patronage withheld by the particular customer", here, United.*

Moreover, contra United (DMB 49), plaintiff did prove that IRCA would have had a loss of profit of $1,200,000 if it did not have all the 1960 banana shipments from western Guatemala and that IRCA's loss of profit would have been $864,000 if it did not have CAG's shipments in 1960** (PMB 151-152). For the 1961 through 1968 period, IRCA's loss of profit from CAG's non-shipments was, at least, $5,089,000 (PMB 151-152).

Defendants attack PX 152 (II 458A-66A) because it

---

* Contra defendants' contention and cases (DMB 50); IRCA's loss of revenue from United's termination of shipments from western Guatemala is causually connected to United's abuse of monopoly power in carrying out its threat to abandon Tiquisate. Thus IRCA's loss of revenue from CAG's non-shipments and United's wrongful conduct are not a "mere coincidence in time" as defendants contend (DMB 50).

** Defendants' argument (DMB 49) that IRCA suffered losses in 1958 on its Guatemala operations when United and Standard were shipping proves nothing since it predates the more critical 1960 year when Standard and United's shipments were at their combined recent high. If we use IRCA's losses from its total Guatemala operations as the test, then plaintiff demonstrated that IRCA's losses in the 1961 through 1968 period were $13,426,000 greater than they would have been if IRCA during that recovery period operated at the 1960 level including the Standard and United west coast banana shipments (PMB 152-153).

"is a single document" (DMB 51); it is indeed irrelevant to argue that the profit is shown only in one document and also that the person writing the document was not called as a witness (DMB 51) when defendants do not claim that PX 152 was erroneously admitted into evidence. Contra defendants (DMB 51), 1960 was not remote, it was the year immediately preceeding the commencement of the recovery period in 1961,and inconsistently two pages before, defendants claim that 1958 should be the base year (DMB 49). Furthermore, the report of Peat, Marwick, Mitchell & Co. confirmed the benefit to IRCA from the west coast banana shipments (II 465A, PX 152) by stating (II 474A):

> "We agree with the comment of your personnel to the effect that if the banana movement were lost, International Railways of Central America could not reduce expenses in proportion. In consequence, an added burden would be placed on remaining traffic. ... we have examined the concepts applied in making the calculation and are satisfied that it follows the methods commonly used by U.S. railroads in making similar cost studies."

Contra defendants (DMB 51), they failed to demonstrate any changes in the composition of traffic movement and volume (other than bananas) from 1960 to 1964. Plaintiff showed a significant decline in United's banana shipments from western Guatemala from over 17,559 cars in 1960 to 6,790 cars in 1964 and none thereafter (PMB 151). The Court did not reach this injury claim of IRCA because it erroneously held there was no antitrust violation and not because of defendants inconsistent and fallacious claim of defects in plaintiff's evidence.*

* Plaintiff's calculation of damages for non-shipments from western Guatemala was adjusted for shipments from eastern Guatemala (PMB 152), contra defendants (DMB 51 ftn.).

A simple reading of the documentary evidence shows that "CAG and United recognized [not 'acknowledged' as defendants misquote, DMB 51,ftn.] 'the fact that future banana shipments from Compania Agricola, the single greatest source of revenue for [Haase's] railroad, is vital to the survival of IRCA.' (II-379A)" (PMB 154). Contra defendants (DMB 51, ftn.), that statement, even though made in 1960, is probative of the fact that United foresaw the fatal consequences to IRCA of its restriction and then complete withdrawal of its western Guatemala traffic due to its abuse of monopoly power.

IRCA had to borrow $4,000,000 from the government of Guatemala in 1968 to meet regular operating expenses including claims of employees (PMB 153-154). The main point is that IRCA needed $4,000,000 and plaintiff proved that but for restriction and cessation of CAG's shipments, IRCA would have had, at least, an additional $5,000,000 (PMB 152) and would not have incurred severance payments of close to $2,000,000 (PMB 154); therefore, IRCA would have been better off by $7,000,000 with no need to borrow $4,000,000.* Thus, there would not have been a mortgage, a default and a foreclosure (PMB 153-154). As demonstrated, defendants actually foresaw the collapse of IRCA if they carried out their threat to abandon Tiquisate (II 379A).

On the issue of whether plaintiff or defendant has the

---

* Plaintiff demonstrated (PMB 154-155) that the events of the 1950's, contra defendants (DMB 50-51), were not the cause of IRCA's collapse in 1969 because IRCA had adjusted its own operations to those 1950's events as evidenced by the fact that in 1960 when Standard and United shipped 24,445 cars from western Guatemala, IRCA only had a $157,000 loss from operations (PMB 153). Thus, the Court's finding to the contrary (DMB 50) was clearly erroneous.

burden of proof on the issue of causality, the District Court erred as a matter of law in holding the burden to be the plaintiff's (I 236A) which is contra this Court's holding in the antitrust case of Klinger v. B & O R.R., 432 F2d 506, at 516 (C.A.2); "the proper resolution is to require the wrongdoers to bear the burden of proof on the issue of causality."

F. Injury To IRCA From Wrongful Restriction And Termination Of CAG's Shipments During The Recovery Period From Pre-Statutory Period Antitrust Violations (PMB 155-156).

Contra defendants* (DMB 53), the closing of Tiquisate in 1964 was caused by United's pre-1961 antitrust violations of monopolization, per se restraints of trade and §7 violation, whether such pre-1961 antitrust violations are viewed by themselves or in combination with defendants post-1961 antitrust violations.

Arguendo, even if United continued to operate Tiquisate while the Valery was being developed as defendants contend (DMB 53) that in no way detracts from the uncontroverted facts shown by plaintiff in its section "United's Cutback At Tiquisate And Increase In Purchases In Ecuador" (PMB 40-49) which demonstrates

* Defendants distort (DMB 53) plaintiff's position by reversing the pre-1961 violation and recovery period injury and incorrectly stating that plaintiff claims "that an alleged reduction in United's shipments prior to 1961 was somehow related to the violation alleged to result from the closing of Tiquisate in 1964." In fact, without the distortion, plaintiff's claim is that the "pre-1961 antitrust violations were a material contributing factor to the reduction and cessation of CAG shipments during the recovery period" (PMB 156). Thus defendants set up, and knock down, a strawman.

United's violations in the pre and post 1961 period and plaintiff's injury in the recovery period (PMB 151-156). United did not plant Tiquisate to a large scale Cocos program that was "planned by the Production Department" (PMB 45), and which was being carried out in Armuelles and Golfito (PMB 46), two other west coast divisions, because of United's abuse of monopoly power in putting the price squeeze on IRCA and other antitrust violations, such as United's pre-emptive pruchases in Ecuador and dumping bananas purchased in Ecuador at an out-of-pocket cash loss in the United States (PMB 43-44).

Defendants claim (DMB 55-56) that the causal nexus between the pre-1961 conduct and alleged injury after 1961 was "broken by the termination of the complained of acts and practices at least as early as 1958*" by the government's consent decree and the Ripley judgment entered on December 19, 1957. But that is preposterous in light of the following events: United's monopolization of Guatemala continued throughout the entire pre and post 1961 period; United's equipment preference, as per the contracts (PMB 95-100) and in practice (as found by the Court, PMB 95) continued throughout the entire pre and post 1961 period; likewise for the various rate and service discriminations on the Barrios pier (PMB 101-106); the rate discrimination on the line haul for bananas and imports even continued through December 31, 1960

* Defendants distort the meaning of the Court's ruling on the collateral estoppel effect of the Ripley findings as of December 31, 1955 (DMB 56, ftn.) and incorrectly contend that it means that the causal nexus between 1955 and 1961 is broken.

(PMB 93-95); and the §7 violation continued through January 1962 at least. The above facts demonstrate that defendants attempt to distinguish Zenith II (DMB 55, fn.) is without merit.

This Court decided the prior appeal in this case in 1967 (DMB 52) and Zenith I and Zenith II were decided by the Supreme Court in 1969 and 1971, respectively. Therefore, this Court never purported to pass on the theories of Zenith I and Zenith II, and plaintiff is not seeking to recover provable pre 1961 damages now but is seeking to recover damages incurred during the statutory recovery period as a result of pre 1961 and post 1961 antitrust violations.

G. IRCA Has Standing To Sue With Respect To United's (CAG's) Restriction And Then Termination Of Its Shipments Over IRCA (PMB 162-164).

After plaintiff filed its main brief on July 16, 1975, this Court decided Long Island Lighting Co. v. Standard Oil Co., Docket Nos. 75-7177, 7178 (C.A.2, Aug. 22, 1975), which supports plaintiff's claim for United's abuse of monopoly power in attempting to fix the price it would pay IRCA. In Long Island Lighting Co. this Court held (Slip Op. at 5733) the second count "charges a conspiracy [of supplier oil companies] to reduce supply and inflate prices charged to electric utilities. Clearly LILCO is within the target area of such a conspiracy". Here, we have a similar price fixing situation, except at the supplier level instead of the customer level. United also reduced and then threatened to eliminate (and did eliminate) shipments and United attempted to deflate the price paid to

IRCA. Thus, here, United's conduct was generally the same as the supplier oil companies conduct alleged in the second count. Therefore here "Clearly [IRCA] is within the target area..." In Goldfarb v. Virginia State Bar, U.S. , 44 L.Ed.2d 572 (decided June 16, 1975) (combination to impose minimum fees for title examinations or put simply, price fixing), the Supreme Court held that consumers (purchasers of homes paying lawyer fees for title examinations) could recover under §4 of the Clayton Act. Goldfarb conclusively rejects United's contention that §4 of the Clayton Act is confined to "competitive" injuries. Accord: Fortner Enterprises, Inc. v. U.S. Steel Corp., 394 U.S. 495, 497 and Coniglio v. Highwood Services, Inc., 495 F2d 1286, at note 13 (C.A.2).

Defendants do not even attempt to distinguish plaintiff's cases on United's (CAG's) restriction and then cessation of its shipments over IRCA pursuant to it abuse of monopoly power (PMB 162-164). In TWA v. Hughes, 449 F2d 51 (C.A.2) rev'd on other grounds,409 U.S. 363, "Toolco refused to finance aircraft acquisitions by TWA unless TWA agreed to purchase planes from no supplier other than Toolco" (332 F2d at 610). Here United refused to ship from Tiquisate unless IRCA reduced the rate.

SCM Corp. v. Radio Corp. of America, 407 F2d. 166 (C.A.2) cert. denied,395 U.S. 943 (1969) cited by defendants (DMB 70, ftn.) is wholly inapplicable; there,plaintiff licensor had no business relationship with defendant as IRCA had with

United here; any injury to the plaintiff licensor was clearly indirect since only its licensees were directly injured. GAF Corp. v. Circle Floor Co., 463 F2d. 752 (C.A.2) cited by defendants (DMB 71) is also inapplicable; as the District Court held on United's second motion for summary judgment (I 41A): "GAF simply was not injured by any anti-trust violation ..."

Defendants assert that "factual questions of motive and intent were not material to standing" (DMB 70, first fn.) and then assert in the text that the court found that none of United's acts were intended to injure IRCA (DMB 70-71). Arguendo, therefore since "intent is not material" to standing, then the District Court's findings of no intent to injure IRCA are also not material.

H. IRCA's Transport of Bananas From Western Guatemala To Barrios For Export To The United States Was "Part Of The Trade Or Commerce ... With Foreign Nations" Under §2 Of The Sherman Act; United's Violations Of §2 Of The Sherman Act Affected The United States' Foreign Commerce.

Defendants, by their silence, (DMB 67) accept plaintiff's contention that the commerce element of §§1 and 2 may be satisfied by showing either that the activity is "in commerce" or that it "affects" commerce, and here plaintiff demonstrated that the IRCA leg of the total transport service in carrying the bananas from Guatemala to the United States is "in" our

foreign commerce (PMB 107, ftn.). Thus plaintiff met the commerce requirements of §§1 and 2.

Arguendo, in any event, contra defendants (DMB 67) plaintiff proved that United's antitrust violations had a direct and substantial affect on U.S. foreign commerce. Bananas imported into United States ports from western Guatemala declined from 5,000,000 stems in 1960 to 8,000 stems in 1964 and none thereafter (PMB 51). Moreover, United has not cited any evidence that shows the amount of bananas that were imported into the United States from eastern Guatemala after 1963.* Contra United (DMB 67),there was no transfer of United's production in western Guatemala to eastern Guatemala since eastern Guatemala's new plantings, as contended elsewhere by United, were in Valery and all 12,000 acres of United's western Guatemala plantings abandoned in August 1964 were in Gros Michel and Cocos,except for an experimental plot of Valerys.

Plaintiff established that a substantial purpose of the concerted restraints was to affect the import of bananas into the United States by United-CAG. See Aluminum Co. of America, supra, 443 et seq.

Point III

THE DISTRICT COURT'S COMPLETE FAILURE TO RECOGNIZE THAT THE PER SE VIOLATIONS OF §1 OF THE SHERMAN ACT RESTRICTED, FORECLOSED AND SUPPRESSED COMPETITION - DEMONSTRATES THAT ITS FINDINGS OF FACT WERE CLEARLY ERRONEOUS.

* But in any event, that is immaterial.

A. Defendants' Arguments Are Immaterial And Irrelevant To The Plain Meaning Of The Contracts Which, On Their Face, Required IRCA To Discriminate In Favor Of United (CAG) On Equipment For Shipping Bananas (PMB 95-100, 110-111, 142-145).

Defendants desperate arguments are preposterous. Defendants do not challenge plaintiff's law points that equipment discrimination is a per se violation (PMB 140-142, 109-111). Defendants do not challenge the fact that (DMB 32-33) on their face, the plain meaning of the contracts, continuing into the recovery period, were discriminatory on the equipment, in favor of United (CAG) (PMB 97). Arguendo, defendants contend, (DMB 32) that because certain lawyers* in the Ripley case overlooked the contract provision requiring discrimination, then that affects the plain meaning of the contracts. To state the proposition is to refute it.

Defendants make the preposterous argument (DMB 32) that because the 1958 Consent Decree prohibited discriminatory contracts, then someway, somehow, that confirms that the United-IRCA contract was not discriminatory.

Defendants assert that United did not cause the contracts to continue beyond 1957 (DMB 32-33), but the fact is that United, through its control over IRCA, coerced the contracts from IRCA in 1948 for a 20-year period. In Ripley,

* Actually, there is no direct evidence that the Ripley plaintiffs counsel overlooked the contract provision.

United urged through the Court of Appeals of the State of New York that the contracts were fair and binding on both parties until their termination. All the Courts in Ripley held the contracts binding until their termination date, except as modified as to rates. Ripley did not pass on antitrust issues.*

The fact that legal title to the equipment was in CAG does not change the fact that the equipment was leased to IRCA on discriminatory terms. The equipment discrimination was one of United's methods in restricting, foreclosing and suppressing competition through its power to determine if, when and to what extent banana cars and locomotives would be made available to other banana shippers. This contract provision was clearly a per se violation under U.S. v. Reading Co., 253 U.S. 26 (PMB 110) and other cases cited by plaintiff (PMB 109-11, 140-43).

Moreover, contra defendants (DMB 33), the Ripley findings,adopted by the District Court by collateral estoppel, show that the alleged ownership of CAG cars was merely a "disguise" and was "misleading" (I 132A, 134A, 136A-7A, B367, B369, B389, B390(a)(b), B391(a)(b)). Contra defendants (DMB 33, ftn.), the disguise was not only applicable to the 1936 agreements, it was also applicable to the 1948 agreements (I 136A-7A, B389 through B391), in force during the recovery period in suit. Contra defendants (DMB 33, fn.),the Ripley judgment

* 8 N.Y.2d 430 at 446.

only eliminated discrimination on the line haul rates for bananas and imports after December 31, 1960; however, the equipment preference, inter alia, in United (CAG) remained (II 670A, PX 909).

In effect defendants now put to this Court the same "disguise" concocted by United in 1936 and continued in the 1948 agreements, which Ripley held to be "misleading". Thus defendants contend (DMB 33) "It is not discriminatory to make arrangements with a railroad to provide transportation services on the shipper's own freight cars." Defendants are treating the legal title in CAG as a justification for an equipment preference and thus ignore the fact that IRCA was paying for the equipment it leased from CAG.*

United fails to answer plaintiff's showing that United (CAG), through its equipment preference and requirement that IRCA carry all bananas tendered by CAG from western Guatemala, had the power to, and did regulate and control, Standard's or any other potential competitor's capacity to ship bananas from western Guatemala to Barrios (PMB 98-100, 108-111, 142-144). Accordingly, the issue, contra defendants (DMB 37), was not what Standard did ship, but what it did not produce and ship because

---

* Defendants contend that there is no evidence that Standard was precluded from making the same arrangement with IRCA for use of cars it would supply IRCA (DMB 33). This is irrelevant and immaterial; first because such an arrangement with Standard would only mean further discrimination against other potential shippers other than United (in effect, the suggested cure for discrimination is further discrimination); second, it ignores the fact that IRCA was required under its contracts with United and CAG, which continued until December 31, 1967, to carry all bananas tendered by CAG from western Guatemala to Barrios, at least to the extent of using all its CAG leased equipment (II 666A, PX 908, ¶1, conceded by defendants below (REPPF 83)). Thus, the legal, economic reality precluded such an arrangement with Standard since it always stood behind United-CAG.

of United's per se violations.* Furthermore, the per se violations on equipment are in United's power to regulate the number of cars to competitors and in no way depend upon whether Standard ever asked for a greater share of the use of CAG cars, contra defendants (DMB 37).

Furthermore, defendants do not rebut plaintiff's showing (PMB 143-45) that the Court overlooked the fact that Standard did expand its operations in other Central American countries while it was operating in Guatemala thus showing that, but for defendants' per se antitrust violations, Standard would have expanded in Guatemala.

Moreover, defendants fail to rebut plaintiff's showing that in 1959 United refused IRCA's request to return 100 banana cars to Guatemala for use in western Guatemala, and such refusal limited IRCA's capacity to carry CAG and Standard bananas from western Guatemala during the recovery period (PMB 99-100, 144).

B. Discrimination On The Line Haul Banana Rate (PMB 93-95)

The discriminatory rate on the line haul continued through December 31, 1960 (PMB, App. B); it was not cured merely because Ripley ordered CAG to pay $130 per car as of January 1, 1958 (DMB 36) since United disputed it on the appeals in Ripley and

* In addition, the Court found that in practice CAG was given a preference on equipment in the transportation of bananas from the west coast (I 212A). The unrefuted evidence supports the finding in the Court's opinion that there was in fact a preference to CAG over Standard in the transportation of bananas from western Guatemala (PMB 98, TR 351, 339-340, I 212A). Plaintiff indicated in its main brief that the District Court's finding 57 (I 273A) was inconsistent (PMB 95, ftn.) with its opinion at I 212A. Defendants, without citing the Court's opinion, only cite the inconsistent finding (DMB 37).

did not actually pay it until March of 1961.*

Contra defendants (DMB 36), plaintiff showed that United's witness had no personal knowledge and only guessed at the type of spotting services IRCA performed for Standard (PMB 106). Moreover, the Court erroneously excluded (PMB 167-170) Ripley finding D69 (I 164A), which stated that the difference in cost to IRCA of terminal services at point of origin for Standard and CAG was insignificant.

C. Discrimination On The Line Haul Import Rate (PMB 95).

Contra defendants (DMB 36-7) plaintiff's evidence established the public tariff rate for shipment of the same materials and supplies as shipped by United; the evidence shows that Standard paid such public tariff rates (II 802A-1, 799A). Since Ripley required United (CAG) to make payment based on the public tariff, which United did not do until March 1961, then United had a discriminatory rate advantage over Standard in the pre-statutory period.**

---

* Defendants' assertion (DMB 36) that the line haul for Standard's bananas was longer than the line haul for CAG's bananas is irrelevant since Ripley found that the fair rate for CAG's banana shipments on the line haul was $130 per car, which was something less than the charge made to Standard, which paid an additional amount for a wage and fuel adjustment in and after 1958 (PMB, App. B, II 806A). Thus, contra defendants (DMB 36), there was a discriminatory rate on a line haul prior to 1958 when United paid between $75 and $93 per car while Standard paid $130 per car. The burden of proof was on United to show a cost justification for the difference of $37 to $55 per car (PMB, App. B) as in Robinson-Patman Act cases, Automatic Canteen Co. v. Federal Trade Commission, 346 U.S. 61, 79-80; United States v. Borden Co., 370 U.S. 460.

** Defendants did not offer a cost justification for the difference between the public tariff rates of $350 per car as against $60 and later $100 to United (CAG) for imports delivered to western Guatemala (PMB 95).

D. Discrimination On Wharfage Charges (PMB 101-104).

Defendants fail (DMB 37-38) to refute plaintiff's showing that the Court's conclusion of no discrimination is inconsistent with the Court's finding* (PMB 101-104). Contra defendants (DMB 38, ftn.), Ripley did not rule on the issue of whether IRCA's charges were discriminatory under the antitrust law, Ripley, 8 NY2d, at 446.

E. Discrimination In Practices And Services At The Pier (PMB 104-106).

Defendants fail (DMB 38) to refute the documentary evidence that shows, in fact, United enjoyed a substantial cost advantage in having a preferential berth at the Barrios pier and accordingly, the District Court's findings are clearly erroneous (PMB 104-106). As a matter of law, United, being first in Guatemala, does not justify preferential berthing. Other shippers should have had equal access to the North side of the pier and the conveyors thereon.

F. Injury From Wrongful Restriction, Foreclosure And Suppression Of Competitive Shippers (PMB 156-162).

Plaintiff's position is that under §4 of the Clayton Act only the "antitrust plaintiff" has to prove injury in his

* The Court's comment regarding Mr. Haase's testimony during the trial (DMB 38, first ftn.) was before the Court's opinion when it accepted plaintiff's proof that Standard was at a 35% disadvantage on wharfage charges, to wit, Standard paid IRCA at least $46.00 per car while United's cost was $34.04 (I 208, PMB 101, 106). In fact, evidence erroneously excluded shows that IRCA's pier charges to Standard were $48.00 per car, or over 100%, greater than United's cost (PMB 101 and footnote).

business or property by reason of any violation of the antitrust laws (PMB 150). Defendants cite no case to support the District Court's erroneous legal holding, namely, that an antitrust plaintiff has to prove, on the fact of damage, that its customers had the "intention, preparedness and capacity "to ship more bananas than they actually shipped (I 360A, 4, I 286A, 93, I 234A-5A). In fact all the cases cited by defendants (DMB 41-42) support the proposition that "an antitrust plaintiff* claiming injury from unlawful conduct ... can only prove injury under Section 4 of the Clayton Act by first establishing that it had the intent, preparedness and capacity ..." (DMB 41). Thus defendants' statement shows that all the cases under §4 limit the requirement to "an antitrust plaintiff" and not to its customers.

Arguendo, even on the Court's theory, since Standard was already in Guatemala (like Zenith was already in Canada in Zenith I and II), and, contra the Court (I 287A, 97; DMB 45), "expanded significantly" in other Central American countries, namely, from 4,752,000 stems in 1959 to 6,795,000 stems in 1961 and to 8,024,000 in 1962** (PMB 143), then Standard would be entitled to recover for restriction of its capacity to ship in Guatemala

---

* Thus Zenith I, quoted by defendants (DMB 42-43) supports plaintiff; the Supreme Court stated: "Section 4 of the Clayton Act required that Zenith [here, IRCA] show an injury to its 'business or property by reason of anything forbidden in the antitrust laws.'" Plaintiff has shown just that. In Zenith II, supra, plaintiff did not have to prove who its customers in Canada would be, contra the Court's (I 235A) requirement here (PMB 158-160).

** In Costa Rica-East in particular, Standard increased its shipments from 237,000 stems in 1959 to 737,000 stems in 1960, to 1,483,000 stems in 1961 and by 1964 to 2,648,000 stems (PMB 144, II 846A, 845A, 826A).

and derivatively, IRCA would be entitled to recover. However, defendants theory is incorrect, and therefore, the cases cited by defendants (DMB 43, ftn.) are inapposite. Contra defendants (DMB 44), United's per se violations restricted Standard and foreclosed other potential shippers so that they never reached the point of a "business calculus."

As to potential competitors other than Standard, plaintiff need only prove "some damage" plus "wrongful acts [which have a] tendency to injure plaintiff's business" (PMB 150). United's per se violations clearly had a tendency to injure plaintiff's business. As to "some damage", as held in Zenith I, supra, at 120, "This deprivation in itself [preferences in United] necessarily had an impact on [IRCA] and constituted an injury to its business"* (PMB 160).

As to the English market in Zenith I [as distinguished from the Canadian market] it was found that plaintiff Zenith never "intended to and was" not "prepared to enter the English television market during the damage period" (DMB 43). But here IRCA is the plaintiff and IRCA was in the market for transporting bananas.** Arguendo, defendants quotation re the English market

---

* The Court's requirement that plaintiff prove the antitrust violations "actually kept potential shippers out of Guatemala" (I 236A) in effect requires plaintiff to prove a public injury where there is a per se violation of the antitrust laws, contrary to well established precedent (PMB 159-160). All the cases upon which plaintiff relies did not involve the United States Government as the plaintiff (PMB 159, 142), (contra DMB, 42, ftn.).

** American Banana Co. v. United Fruit Co., 166 F2d 261 (C.A.2, 1908), aff'd 213 U.S. 347 (1909) is inapposite since plaintiff failed to allege the necessary intention to engage in the business from which it claims to have been excluded.

is wholly inapplicable to Standard since it was in Guatemala; then the Canadian market in Zenith I is comparable here, since Zenith, like Standard, was already there.

IRCA was bound by contract to give an equipment preference to CAG and United until January 1, 1968 (PMB 96-99). IRCA was not free to unilaterally alter that agreement, contra defendants (DMB 47). United could have prevented violations of the antitrust law by simply agreeing to be treated like other shippers and paying the public tariffs. The fact that IRCA did not require United to give up its discriminatory preferences after 1961 demonstrates that the effects of control had not been dissipated (In TWA v. Hughes Tool Co., supra, the effects of control were held to have continued until three years after Hughes' sale of his TWA stock).*

G. IRCA Has Standing To Sue With Respect To The Restriction, Foreclosure And Suppression Of Competitive Shipments Over IRCA (PMB 164-165).

United, the wrongdoer, had contracts and a business relationship with IRCA (and arguendo, prior to 1961, control of IRCA) and used IRCA, as its instrument, to restrict, foreclose and suppress United's competitors. Thus, here, unlike the plaintiff in Nassau County Ass'n of Ins. Agents, Inc. v. Aetna Life & Cas. Co., 497 F2d 1151 (C.A.2), IRCA did "business with the defendant";

* Since it is undisputed that United's vote of its IRCA stock in 1958 prevented an independent IRCA board from being elected, then it must be assumed that the IRCA Board in 1961 was aware of that fact. It was United's holding of the IRCA stock through January 1962 that gave it the power to oust the IRCA directors. That was a wrong which prevented IRCA's Board from taking action on Standard's request to be treated like United on the Barrios pier.

the antitrust claims arise therefrom. Therefore, the injury is "direct."

None of the cases cited by United* (DMB 67-70) cover our factual pattern whereas plaintiff's cases do (PMB 164-165); also see TWA v. Hughes, supra (just as Toolco unlawfully monopolized and conspired with TWA to foreclose the sale of airplanes to TWA (449 F2d at 68), so United unlawfully monopolized and conspired with IRCA to restrict and foreclose the shipment of bananas over IRCA from western Guatemala).

Arguendo, even if as defendants contend (DMB 70, first ftn.), control of IRCA was ended as early as 1959, which is contrary to the facts, nonetheless the contracts were coerced from IRCA prior to that date and continued with their discriminatory features during the recovery period, inter alia (PMB 93-106).

Moreover, as noted by the District Court on defendants' second motion for summary judgment (I 39A), "The Court of Appeals for this Circuit has already had this antitrust action before it and failed, in a long and careful opinion to express even a hint of doubt that the plaintiff had standing to sue." The District Court at that time also cited (I 42A) Continental Ore Co. v. Union Carbide, 370 U.S. at 699-700:

---

* The District Court on United's second motion for summary judgment distinguished the cases (I 40A-42A) upon which defendants rely (DMB 68-70) and held (I 42A):

> "If we approach the present question of standing by categorization, IRCA does not fall within any category of the excluded. It is not a stockholder, employee, franchisor, patentee, licensor or landlord."

> "There the Court held that 'the injury alleged to flow from a monopolist's elimination of one's independent suppliers [was not] so"remote" as to justify refusing to let the damages issue go to the jury.' 370 U.S. at 699-700. The entity destroyed was the independent supplier, but the injury to the buyer resulting from the illegal act was not so remote as to exclude standing."

Our facts are a fortiori since, in addition, IRCA had a business relationship with defendants. Thus, IRCA was directly injured by United's imposed discriminatory rates and practices on IRCA that restricted, foreclosed and suppressed IRCA's customers from shipping over it.

H. The Documentary Evidence Is Overwhelming In Support Of The District Court's Assumption That United And CAG Come Within The Inter-corporate Conspiracy Doctrine (I 250A, ftn. 13, PMB 139-140).

Numerous exhibits in evidence, some on the letterhead of CAG and some on the letterhead of United, demonstrate the inter-corporate conspiracy, assumed by the Court (I 250A, ftn.13). CAG was in constant communication by letters with United and vice-versa. The record is so replete with such evidence that it is a mark of defendants desperation that it now raises the issue for the first time. Up to now the defendants only argued the proposition of law, implicitly assuming that the facts did show the inter-corporate conspiracy at the factual level. For example, United on September 23, 1963 initially adopted the resolution of its board of directors authorizing the sale of assets of CAG on a piecemeal basis and the closing down of Tiquisate in

1964 (II 397A). On the same day the Board of Directors of CAG, meeting in Boston, adopted substantially the same resolution (II 392A). The documentary evidence shows that United threatened IRCA that unless it reduced the $130 rate, it would abandon Tiquisate (PMB 12-20); the documents also show that like threats were made by CAG to IRCA (PMB 12-20, for example II 391A ¶2). The documentary evidence shows communications between United and CAG in connection with formulating a policy against IRCA involving the ultimate abandonment of Tiquisate.*

With regard to a conspiracy in restraint of trade it was through United's control and domination of IRCA that contracts were coerced from IRCA for CAG that provided for discriminatory rates and services in favor of CAG.** The conspiracy and combination of the separate corporate entities of United and CAG to require IRCA to discriminate against competitive banana producers was established to the hilt.

United's argument (DMB 64) in substance is that a parent and wholly owned subsidiary constitute a single entity for antitrust purposes, unless they hold themselves out as competing with each other. The Supreme Court case, which is United's main reliance in this argument, Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.,*** 340 U.S. 211, does not support such restriction. There, the Court held as follows (215):

---

* For example, II 378A, 4th ¶, II 379A, last ¶; II 374A-5A.

** II 654A-674A; II 620A-652A, etc.

*** Cited in Beckman v. Walter Kidde & Co., 316 F. Supp. 1321 (E.D.N.Y.) aff'd 415 F2d 593 (C.A.2), cert. denied 408 U.S. 922.

> "common ownership and control does not liberate corporations from the impact of the antitrust laws. E.G. United States v. Yellow Cab Co., 332 U.S. 218. This rule is especially applicable where, as here, respondents held themselves out as competitors."

Thus, the situation where the parent and subsidiary hold themselves out as competitors is an a fortiori instance of the rule but the rule, as stated in Kiefer, is that they are separate entities for antitrust purposes whether or not they hold themselves out as competitors.* The very case cited by Kiefer in support of the rule; namely, United States v. Yellow Cab Co., 332 U.S. 218, was a case where the corporations did not hold themselves out as competitors.

Furthermore, Perma Mufflers v. Int'l Parts Corp., 392 U.S. 134, does not admit of the restriction United seeks to impose on the rule. There the Supreme Court, per Black, J. held (141-142): since

> "Midas and International availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities."

United and CAG, admittedly "separate corporations" (under New Jersey and Delaware incorporation, respectively), have "the obligations that the law imposes on separate entities"; they are

* Sanib Corp. v. United Fruit Co., 135 F.Supp. 764 (S.D.N.Y.) the complaint alleged an unlawful combination and conspiracy between United Fruit Co. and its Honduras subsidiary, Tela Railroad Co.; in denying a motion to dismiss, the Court held (at 766): "The common ownership of United and Tela does not insulate these corporations from the antitrust laws sanctions."

therefore a combination which must not act in restraint of trade or to monopolize. The Court in Perma didn't say that the two were a single entity unless they held themselves out as competitors or otherwise qualify the rule.

In Joseph E. Seagram & Sons Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F2d 71, 82 (C.A.9), the Court stated:

> "It is now settled law that if a corporation chooses to conduct part of its business through subsidiary or affiliated corporations, and conspires with them to do something that independent entities cannot conspire to do under section 1 of the Sherman Act, it is no defense that the corporations are, in reality a single economic entity."

United and CAG are separate corporations, seeking the privileges of separate legal entities and therefore subject to the obligations of separate legal entities, Perma, supra, They are therefore capable of combining and conspiring with each other in conduct which violates the antitrust laws and in fact, did so.

Point IV

DEFENDANTS IMPLICITLY CONCEDE (DMB 58 ftn.) THAT THE DISTRICT COURT (I 230A) ERRED AS A MATTER OF LAW IN DISMISSING THE ACTION ON THE GROUND THAT "THE THREAT OF COMPETITION IS MEASURED AT THE TIME OF SUIT" IN A PRIVATE DAMAGE ACTION UNDER §7 OF THE CLAYTON ACT (PMB 147-149).

Defendants implicitly agree (DMB 58, ftn.) with the plaintiffs that the Court erred as a matter of law in holding that in a private damage action "the threat of competition is

* Accord: Fortner Enterprises, supra; Woods Exploration, supra, 438 F2d 1286, 1308, n.9 (C.A.5); U.S. v. Genl. Motors, 121 F2d 376, 404 (C.A.7); and Minn. Bearing Co. v. White Motor Corp., 470 F2d 1323 (C.A.8). The other cases United cites (DMB 64-65) are easily distinguished; both Ark Dental Supply Co. v. Cavitron Corp., 461 F2d 1093 (C.A.3) and Beckman, supra, cited Seagram, supra.

measured at the time of suit" under §7 of the Clayton Act. Thus the District Court erred as a matter of law in dismissing the §7 cause of action.*

Here, United continued to own IRCA's stock until January 1962 which was a clear violation of §7, even though it only lasted for eleven months of the recovery period, Gottesman v. General Motors Corp.**, 414 F2d 956 (C.A.2). Moreover, in fact, the effects of that violation were not dissipated until at least three years thereafter, TWA v. Hughes Tool Co., supra.

Plaintiff's cited cases (PMB 166) are right on point in support of standing to sue under §7 while defendants' only cited case, GAF, supra, (DMB 69) was distinguished by the Court on United's second motion for summary judgment by stating (J 41A) "GAF simply was not injured by any antitrust violation."

Defendants fail to rebut plaintiff's showing that

---

* Plaintiff demonstrated that it established the probability of both undue restraint and monopolization at the time of the acquisition of stock and by post-acquisition conduct. As this Court held (I 7A) on the first appeal, the 1936 stock acquisition was made "for the double purpose of insuring continuation of the favorable freight rates and service on its own products and of preventing similarly favorable rates to competitors." Plaintiff's claim under §7 covers all of the violations of the antitrust laws under §1 and 2 of the Sherman Act (PMB 107-49) which is more comprehensive than defendants' statement (DMB 57-58).

** In Gottesman, the plaintiff failed to prove injury on remand (DMB 59) but here plaintiff proved that the §7 violation was the proximate cause of the injury to IRCA (PMB 150-162, 107-149). It is noteworthy that at the time Standard quit western Guatemala in November 1961 United still held its stock ownership in IRCA and had until 1966 to divest it under the Consent Decree; that put Standard in the position where any future investment it made in western Guatemala was subject to the power of United to restrict or suppress it.

"transport"of bananas is in the foreign commerce of the United States; hence IRCA is engaged "in commerce" for purposes of §7 of the Clayton Act* (PMB 148, footnote). With respect to §7 of the Clayton Act, the Supreme Court in Gulf Oil Corp. v. Copp Paving Co., Inc.** 419 U.S. 186, 195 stated as follows:

> "In contrast to §1, the distinct 'in commerce' language of the [§7] Clayton ... Act provisions with which we are concerned here appears to denote only persons or activities within the flow of interstate commerce - the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer."

Under the authorities it is clear that in our case the activity involved is "in" the foreign commerce of the United States. "The flow of interstate [or foreign] commerce begins when the goods or services in question are shipped from their place of origin and such shipment is destined to cross a state line." 1 Von Kalinowski, supra, at p.5-41, cases collected in n.49. Where "transportation services" contribute a link in a continuing journey, "the courts have held the link to be part of the flow of interstate [or foreign] commerce." Id. p.5-65, cases in n.92. Temporary stop-overs are not material, id. p.5-49, cases in n.61, p.5-51. (as already noted, the tests as to foreign commerce are

---

* The District Court assumed it, arguendo, in favor of plaintiff (PMB 148 ftn.).

** Defendants reliance on Gulf Oil Corp. is misplaced since there, there were "purely intrastate sales of asphalt" (DMB 66). Furthermore, United States v. American Building Maintenance Industries, 43 U.S.L.W. 4838, 4842, cited by defendants (DMB 65-66), is inapplicable on its face since the acquired firms were "supplying localized services" and were not themselves "directly engaged in the production, distribution, or acquisition of goods or services in interstate commerce."

the same as for interstate commerce - see 1 von Kalinowski, at p.5-120).

The leading authority is Yellow Cab, supra, 332 U.S. 218, the Supreme Court stating as follows:

> "When persons or goods move from a point of origin in one state to a point of destination in another, the fact that a part of that journey consists of transportation by an independent agency solely within the boundaries of one state does not make that portion of the trip any less interstate in character." (228)

Clearly, IRCA transportation for the movement of bananas from western Guatemala to the United States is an activity subject to the antitrust laws because "in" the foreign commerce of the United States, Yellow Cab, supra, and the authorities cited in von Kalinowski, supra.

Point V

DEFENDANTS FAIL TO REBUT PLAINTIFF'S SHOWING THAT THE COURT ERRED AS A MATTER OF LAW ON ITS COLLATERAL ESTOPPEL RULINGS (PMB 167-170)

Defendants conceded below,in their reply brief (Doc. No.66, p.5) on their second motion for summary judgment,by stating without qualification "Plaintiff's opposing memorandum agrees with our position that 'the Ripley findings are binding in this action.'" Defendants' concession stated "in this action", not as they now inconsistently state that they "never agreed that antitrust-type findings were binding" (DMB 73 first ftn.). The Court flatly stated in its opinion (I 44A): "Both sides agree that the findings in Ripley are binding upon the parties in this Court."

Defendants fail to refute plaintiff's showing that the District Court erred as a matter of law by inconsistently using different effective dates for collateral estoppel of the Ripley findings on the contract issue (December 31, 1960) and the antitrust issues (December 31, 1955) (PMB 167-168).

The Court of Appeals in Ripley determined that the original judgment, entered January 19, 1957 and amended January 2, 1958, was final with respect to the rights and relationship of the parties and to damages up to January 2, 1958, necessitating only a calculation of shipments in 1956 and 1957 times the rates fixed.* For the period 1956 and 1957 it was, per the Court of Appeals, not open to the defendant to submit evidence of substantial deterioration of economic conditions.

The decision of the Court of Appeals only spoke to the original and amended judgment. After the decision by the Court of Appeals, the supplemental judgment was entered on March 1, 1961 and fixed damages up through December 31, 1960. United's payment of that supplemental judgment was also an acceptance by United of the findings of fact on the rights and relationship of the parties as of December 31, 1960. Therefore, the "rights and relationship of the parties" were adjusted as of "the date of the [supplemental] judgment" for both the contract claims and antitrust claims. Thus, the Ripley findings should speak as of the same date, to wit, December 31, 1960 or March 1, 1961.

Defendants fail to rebut plaintiff's showing that the Ripley findings clearly met the recognized legal standard for

---

* For a full statement of plaintiff's argument, see Doc. No.151.

application of collateral estoppel* (PMB 168-170).

The Ripley findings that showed United's motive in controlling IRCA "for the double purpose of insuring continuation of the favorable freight rates and service on its own products and of preventing similarly favorable rates to competitors" (I 7A) - were necessary to show a breach of fiduciary duty in Ripley, contra defendants (DMB 73). The Ripley findings, contra defendants (DMB 74), do relate to the closing of Tiquisate in August 1964 since they concern, inter alia, United's early** monopolization and conspiracy in restraint of trade in Guatemala, which continued into, and during, the recovery period.

Defendants never indicated they had any evidence, not offered in Ripley, that demonstrated the Ripley findings (excluded by the District Court) were erroneous. Therefore, the District Court should have, at the very least, admitted into evidence here the evidence admitted in Ripley as to any Ripley findings the

---

* Plaintiff cited Mr. Chandler's affidavit to show certain facts, namely, that Ripley was defended to the hilt by United after "exhaustively" investigating the transactions so that it was clear that "the loser will have put out its best efforts" (Evergreen v. Nunan, 141 F2d. 927, 929 (C.A.2, 1944), contra defendants (DMB 73-74). Thus, defendants (DMB 73) seek to create confusion by making it appear that plaintiff was attempting to capitalize on defendants argument on the first appeal, which was rejected by this Court; in fact, as explained above, that was not the purpose of the quote from Mr. Chandler. The position adopted by the Court on the first appeal was the position taken by plaintiff's counsel (DMB 73), to wit, that Ripley did not litigate the antitrust claims and therefore said antitrust claims were not barred by res judicata or splitting a cause of action. That position is not contrary to the position plaintiff takes on this appeal, since we are now talking about the collateral estoppel effect of findings of fact in Ripley and not res judicata of claims or splitting causes of action.

** Plaintiff stated (PMB 167) the District Court "erroneously excluded many (I 115A-7A)" findings, which included the ones for irrelevancy and remoteness in time (see Appendix Vol. I 146A-192A), contra defendants (DMB 74).

District Court excluded (PMB 170).

Point VI

THE COURT ERRED AS A MATTER OF LAW IN EXCLUDING CERTAIN DOCUMENTARY EXHIBITS

None of defendants authorities precludes the introduction of the excluded documents;* all of them were from United's files. Contra defendants (DMB 77), admissions against interest are not confined to letters sent to persons outside the company.

Point VII

DEFENDANTS FAIL TO REBUT THE LAW THAT UNITED, THE FIDUCIARY CONTROLLING IRCA, HAD THE IMPLICIT OBLIGATION TO BUY IRCA'S SERVICES THROUGH DECEMBER 31, 1967 WHERE IRCA HAD THE EXPRESSED OBLIGATION TO CARRY ALL CAG BANANAS TENDERED THROUGH DECEMBER 31, 1967 (PMB 170-175).

---

* One excluded document (PMB 39, ftn.), sent by Miller (the author of the 1961 Miller Report), demonstrated his own thinking and company policy which was to keep Tiquisate out of the hands of potential competitors; another document (PMB 101, ftn.) showed that IRCA's charges to Standard Fruit on the pier were approximately $48 per car higher than United's costs, thus establishing the pier discrimination and showing that the Court's finding to the contrary was clearly erroneous; another document (PMB 40, ftn.) contained the admission that by 1960 at the latest, United had already decided to "commit no further funds to maintain production at an economic level ..." in Guatemala; another document (PMB 58) showed United's attempts to prevent the Agency for International Development from making or guaranteeing a loan to a potential competitor of United; another document (PMB 86 ftn.) contains an admission by the Controller of United of the substantial savings to United in shipping bananas over IRCA in boxes instead of in stems, contrary to Fox's opinion (I 222A); and a series of excluded documents (PMB 104-05 ftn.) went to the credibility of Sunderland, who violated the consent decree by having meetings with United's major competitor, Standard Fruit.

United had an option to build a port on the west coast of Guatemala after January 1, 1963, but it failed to exercise that option. The Appellate Division found that the port was a sham. Since the option was immaterial, we have a straightforward requirements contract. Defendants do not challenge the law, cited by plaintiff (PMB 171-2), that would imply an obligation in United (CAG) to buy IRCA's services until January 1, 1968 in an arms length transaction. The facts here are a fortiori since United was a fiduciary when it imposed the 1948 contracts on IRCA. Thus, the Court erred as a matter of law in construing the 1948 contract against IRCA, the cestui, by reading into the contract a new, additional right in United, to abandon Tiquisate if it decided not to exercise its option to build a port. The result below erodes the high legal standard applicable to fiduciaries.

Defendants fail to meet (DMB 80-82) plaintiff's argument that "volume of shipments" was found by the District Court to be one of the grounds for the discount in Ripley (PMB 174); thus defendants breached their contract by first restricting (PMB 40-49) and then eliminating its shipments from western Guatemala. When the findings cited by defendants (DMB 81) are read in the light of the Ripley opinions "including the vista of future operations between the companies" (PMB 174), a discount for "volume of shipments", and "the assurance of a stable and substantial traffic volume" (Report and Decision, p.194, Doc. No.74), the New York State Courts intended to give IRCA the latter "assurance" until January 1, 1968. In Klinger, supra, p.516, Judge Friendly, concurring, stated:

> "I should have thought the time long since past when a merely literal approach would be taken by a court whose most illustrious member wrote, in a famous passage: '[t]here is no surer way to misread any document than to read it literally.' ... (L. Hand, J., concurring) ..."

Since IRCA was under United's control in 1948, it was incapable of expressing any intention, contra the Court and defendants* (DMB 81, ftn.).

CONCLUSION

THE JUDGMENT BELOW SHOULD BE REVERSED AND IRCA HELD TO BE ENTITLED TO RECOVERY AGAINST UNITED AND CAG; THE MATTER TO BE REMANDED TO DETERMINE THE AMOUNT OF THE RECOVERY.

Respectfully submitted,

SIDNEY BENDER
Attorney for Plaintiff-Appellant
405 Lexington Avenue
New York, N.Y. 10017

Tel. 986-4080

---

* CAG abandoned Tiquisate while the operation of trains and trackage agreements were still in existence, to wit, until January 1, 1968 (PMB 173-174, II 661A-68A), contra defendants (DMB 82). Defendants statement (DMB 81-82) that Courts may not consider adequacy of consideration is not the law applicable to fiduciaries since Ripley did exactly that. United's quote from Judge Cardozo (DMB 82) is from a case where there was no fiduciary relationship.

2 copies RECEIVED

Date 10/28/75

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER

Attorney(s) for United Brands